SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 35

CHARLES KATZ, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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4 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Criminal Docket 34715
See Misc. 1209

THE UNITED STATES
vs.
CHARLES KATZ

18 USC 1084: Interstate Transmission of bets and wagers and information assisting in the placing of bets and wagers.

8 cts.

Date	Name or Receipt No.	Rec.	Disb.
6-22-65	C. K. (Fine)	300.00	6-25-65
6-28-65	BH (C. K.) (Appl.)	5.00	7- 2-65

Docket Entries

Date	
3/17/65	Ent ord for flg Indict & fxg bail at $1,000. Fld Indict. Md. JS-2. (CC). Fld $1,000. NACIC Bond posted 2/25/65 bef Commr. Hermann at L.A., Calif. Fld Not of Flg Bond.
3/29/65	Fld Pltf's oppos to deft's Mot for suppression of evidence and for return of evidence; and Memo of pts & auths in suppt.
4/ 5/65	Hrg deft's mot to suppress evid, sw witns mkd exbts, both sides rest & Court takes under submn & ord cont to 4/13/65, 1:30 PM for ruling. (JWC). Atty Burton Marks retnd. Deft arraigned.
4/ 5/65	Ord all documents filed in Case Misc. 1209 be incorporated herein. Fld Defts Not of Mot & Mot for return of evidence and to suppress Evidence with pts & auths in suppt. (JWC).
4/13/65	Court makes ruling on deft's mot to suppress. Ct grants in part & denies in part. Deft pleads N/G all 8 cts. Ord set for ext 2 day jury trial on 5/17/65 9:30 am (JWC)
5/ 7/65	Fld deft Charles Katz' Mot to dismiss Indict (Rule 12), FRCP, with pts & auths in suppt. Fld Not of Mot retnble 5/17/65 bef (CC) to dism Indict.

Date	
5/11/65	Fld Ord (JWC) permitting withdrawal of certain exbts.
5 5/13/65	Fld govts trial memo.
5/13/65	Fld Pltf's oppos to deft's Mot to dismiss Indict with Memo of pts & auths in suppt.
5/17/65	Deft & Govt waive Jury & Waiver approved by Court & ent ord cont to 5/18/65 for hrg Mot to dismiss & for trial (CC). Fld Jury Waiver & Ord thereon approving. (CC).
5/18/65	Ent ord assigning case to Judge Curtis for all fur procs. (CC). Ent. ord Court trial cont to 5/19/65, 11 AM. (JWC).
5/19/65	Court trial, 1st day. sw wits adm exhbs ord cont to 5/20/65 1:30 am fur court trial (JWC)
5/20/65	Fur Court Trial, 2nd day, both sides rest & mk arguments. Court finds deft Guilty as chgd in all 8 counts. Ord refd to P/O for I&R & cont to 6/21/65, 2 PM for sent. Issd abstr to P/O. (JWC).
5/24/65	Fld deft Katz' Mot for a New Trial and for a Judgment of Acquittal with pts & auths in suppt.
6/ 3/65	Fld Govt's oppos to defts mot for Judgmt of Acquittal, and in the alt for New Trial.
6/21/65	Mot deft for New Trial ordered denied. Sent deft pay fine to U.S.A. in the amt of $300.00 on ea cts 1 thru 8, concurr. (Total Fine $300.00). Deft ord stand committed until fine paid. Ord deft granted 24 hrs stay on payment of fine. Bond exon. Fld Judgmt & issd cys. Ent. 6/22/65. Md. JS-3 (JWC).
6/28/65	Fld deft's NOTICE OF APPEAL with proof of service to U. S. Atty. Issd abstr re Not of Appeal to U. S. Mars. Md stmt of docket entries. Pd. $5.00.
6/30/65	Fld appellant's desig of record on appeal.
7/ 6/65	Fld Appellee's counterdesignation of Record on Appeal.
7/16/65	Fld Commit retnd exec.
9/29/65	Fld Applic for extnsion of time to file reporter's transc on Record on Appeal & Ord (PH for CC) thereon extendg time to & incldg 10/25/65.

(File endorsement omitted)

6 IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

February, 1965 Grand Jury

No. 34715 CD

UNITED STATES OF AMERICA, *Plaintiff*,

v.

CHARLES KATZ, *Defendant*

Indictment—Filed March 17, 1965

[18 U.S.C. § 1084: Interstate Transmission of bets and wagers and information assisting in the placing of bets and wagers]

The Grand Jury charges:

COUNT ONE

[18 U.S.C. §1084]

On or about February 19, 1965, at approximately 8:43 a.m., defendant CHARLES KATZ, being engaged in the business of betting and wagering did knowingly use a wire communication facility, that is a telephone facility, for the transmission in interstate commerce, from Los Angeles County, California, within the Central Division of the Southern District of California to Boston, Massachusetts, of information assisting in the placing of bets and wagers.

7 COUNT TWO

[18 U.S.C. §1084]

On or about February 19, 1965, at approximately 8:54 p.m., defendant CHARLES KATZ, being engaged in the business of betting and wagering did knowingly use a wire communication facility, that is a telephone facility, for the transmission in interstate commerce, from Los Angeles County, California, within the Central Division of the Southern District of California to Boston, Massachusetts, of bets and wagers, and information assisting in the placing of bets and wagers.

8 COUNT THREE

[18 U.S.C. §1084]

On or about February 20, 1965, at approximately 8:31 a.m., defendant CHARLES KATZ, being engaged in the business of betting and wagering did knowingly use a wire communication facility, that is a telephone facility, for the transmission in interstate commerce, from Los Angeles County, California, within the Central Division of the Southern District of California to Boston, Massachusetts, of bets and wagers, and information assisting in the placing of bets and wagers.

9 COUNT FOUR

[18 U.S.C. §1084]

On or about February 21, 1965, at approximately 9:31 a.m., defendant CHARLES KATZ, being engaged in the business of betting and wagering did knowingly use a wire communication facility, that is a telephone facility, for the transmission in interstate commerce, from Los Angeles County, California, within the Central Division of the Southern District of California to Boston, Massachusetts, of bets and wagers, and information assisting in the placing of bets and wagers.

10 COUNT FIVE

[18 U.S.C. §1084]

On or about February 23, 1965, at approximately 8:44 a.m., defendant CHARLES KATZ, being engaged in the business of betting and wagering did knowingly use a wire communication facility, that is, a telephone facility, for the transmission in interstate commerce, from Los Angeles County, California, within the Central Division of the Southern District of California to Miami, Florida, of information assisting in the placing of bets and wagers.

11 COUNT SIX

[18 U.S.C. §1084]

On or about February 24, 1965, at approximately 8:56 a.m., defendant CHARLES KATZ, being engaged in the business of betting and wagering, did knowingly use a wire communication facility, that is, a telephone facility, for the

transmission in interstate commerce, from Los Angeles County, California, within the Central Division of the Southern District of California, to Miami, Florida, of bets and wagers and information assisting in the placing of bets and wagers.

12 COUNT SEVEN

[18 U.S.C. §1084]

On or about February 25, 1965, at approximately 8:46 a.m., defendant CHARLES KATZ, being engaged in the business of betting and wagering, did knowingly use a wire communication facility, that is, a telephone facility, for the transmission in interstate commerce, from Los Angeles County, California, within the Central Division of the Southern District of California to Boston, Massachusetts, of bets and wagers, and information assisting in the placing of bets and wagers.

13 COUNT EIGHT

[18 U.S.C. §1084]

On or about February 25, 1965, at approximately 8:53 a.m., defendant CHARLES KATZ, being engaged in the business of betting and wagering did knowingly use a wire communication facility, that is, a telephone facility, for the transmission in interstate commerce, from Los Angeles County, California, within the Central Division of the Southern District of California to Boston, Massachusetts, of bets and wagers, and information assisting in the placing of bets and wagers.

A TRUE BILL

/s/ FRANCIS E. OAKS
Foreman

/s/ MANUEL L. REAL
United States Attorney

(File endorsement omitted)

14 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

Commissioner's Docket No. 42
Case No. 129

Notice of Motion to Suppress Evidence and for Return of Evidence (Exhibits and Points and Authorities in Support Thereof)—Filed April 5, 1965

TO THE CLERK OF THE ABOVE ENTITLED COURT AND TO UNITED STATES OF AMERICA AND ITS ATTORNEYS:

PLEASE TAKE NOTICE that on the 22 day of March, 1965, at 2:00 P.M. or as soon thereafter as counsel may be heard in the courtroom of Judge Charles H. Carr at the United States Post Office and Courthouse, 312 North Spring Street, Los Angeles, California, a motion will be made, and is hereby made for the following relief:

1) That all papers, records, documents and other property seized by the Government on February 25, 1965 from the home of the defendant Charles Katz pursuant to search warrant be returned to the defendant. (A copy of said search warrant and what is presumed to be the affidavit of Special Agent for the FBI, John Robert Barron, and inventory is attached hereto as an exhibit); and

2) That any and all of the aforesaid documents, records, papers and other property so seized be suppressed
15 and that the United States District Attorney be restrained from using any documents or other papers aforesaid upon the trial or otherwise, or any information directly or indirectly attained therefrom, or by means thereof; and

3) That all of the said property so unlawfully seized be returned forthwith to the defendant; and

4) That all property taken from the person of the defendant on the date of his arrest, to wit, February 25, 1965, be similarly suppressed and returned forthwith to the defendant; and

PLEASE TAKE FURTHER NOTICE that at the aforesaid date and time, further motions will be made with respect to the suppression of evidence obtained pursuant to invalid searches and seizures on February 19, 20, 21, 23 and 24 of conversations had by the defendant within public phone booths located at 8210 Sunset Boulevard, Hollywood, California, which have phone numbers OL 4-9275 and OL 4-9276, which said conversations were tape recorded by having microphones taped to the outside of said phone booths.

AND FURTHER motion will be made to suppress evidence of any conversations heard by Special Agent Allen F. Frei of the Federal Bureau of Investigation overheard on February 23, 1965 or any other date while said special agent occupied Room 123 of the Sunset Towers West, which is adjacent to defendant's room 122, all of which aforesaid evidence and conversations were seized and obtained from the defendant in violation of Amendment Four to the United States Constitution.

This motion will be based upon all the files, records, affidavits and inventory contained in the 1965 Commissioner's Docket No. 42 (Case No. 129); upon such evidence which shall be produced at the time of the hearing of said motion and upon the points and authorities submitted herewith and said motions will be based generally upon the following grounds:

16 1) That any conversations of the defendant overheard by special agents of the FBI were obtained by a direct violation of the defendant's right to privacy and without warrant, and were therefore unlawful "searches and seizures" in violation of the defendant's rights under the Fourth Amendment to the United States.

2) That any arrest or search warrant issued upon the information obtained through the use of illegally obtained evidence is illegal and void.

3) That the search warrant obtained was not obtained upon any probable cause and was void.

4) That the search warrant was a general search warrant and void.

5) That the search warrant was intended and used for the purpose of obtaining evidence and being an "evidentiary search warrant" is void.

DATED: March 8, 1965.

Respectfully submitted,

/s/ BURTON MARKS

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17 POINTS AND AUTHORITIES

1) THE UNLAWFUL OBTAINING OF EVIDENCE THROUGH THE AID OF LISTENING DEVICES (THE UNLAWFUL INVASION).

It is submitted that whatever vitality *Olmstead vs. U. S.*, 277 U.S. 438, 72 Law Ed. 944, had in prior years, it is now a "dead letter" case in that electronic eavesdropping will not be countenanced by the United States Supreme Court as a violation of the Fourth Amendment. See *Silverman vs. U. S.*, 365 U.S. 505, 5 Law Ed. 2d 734 and dissenting opinion.

> *Lopez vs. U. S.*, 373 U.S. 427, 10 Law Ed. 2d 462 (with special reference to the dissents of Justices Brennan, Douglas and Goldberg).

In 1963, the Ninth Circuit in *People of the State of California vs. Hurst*, 325 Fed. 2d 891, cited with approval Brock vs. U. S., 223 Fed. 2d 681 as follows:

> "Whatever quibbles there may be as to where the curtilage begins and ends, clear it is that standing on a man's premises and looking in his bedroom window is a violation of his 'right to be let alone' as guaranteed by the Fourth Amendment." (325 Fed. 2d 898).

Surely a man has as much right to be let alone in a private telephone booth as in his own home. Although the affidavit of agent Barron does not indicate how the conversations were overheard from the adjoining room to the defendant's apartment, it is submitted that evidence at the time of the motion will show that these conversations were also overheard through electronic eavesdropping.

It is quite obvious that if the conversations overheard and electronically recorded by special agents of the FBI were obtained in violation of the Fourth Amendment, that that evidence could not be used to establish "probable cause" for an arrest or a search warrant, since such
18 warrants would be the "fruit of the poisonous tree."

Obviously, when an illegal search and seizure has been made and conducted and the same is shown by evidence, the burden of proof shifts to the Government to show probable cause for such search and seizure sufficient to justify the same. (*U. S. vs. Paroutian,* 299 Fed. 2d 486).

2) THE SEARCH WARRANT WAS VOID FOR TWO REASONS: (A) IT WAS AN EVIDENTIARY SEARCH WARRANT, AND (B) IT WAS A GENERAL SEARCH WARRANT, BOTH OF WHICH ARE PROHIBITED BY THE FOURTH AMENDMENT.

A) A search warrant which authorizes a search for evidence is illegal; it violates both the Fourth and Fifth Amendments to the United States Constitution.

The constitutional law is unerringly to the effect that a search for evidence violates these constitutional rights. (See Harris vs. U. S., 331 U.S. 145, 154, especially where as here the items specified in the search warrant are not the "fruits or instrumentalities" of the crimes of using the wires or violation of the Internal Revenue Code.

Recently the Court of Appeals for the Ninth Circuit in *Gilbert vs. U. S.,* 291 Fed. 2d 586, 596 (1961), ruled:

> "We think we must recognize and respect '. . . the distinction between merely evidentiary materials, on the one hand which may not be seized . . .'"

And searches for instrumentalities, contraband, etc., citing Harris vs. U. S., and the court held illegally seized material obtained during a lawful search, because conducted as incident to a lawful arrest, but which were evidentiary in character.

In *Boyd vs. U. S.,* 116 U.S. 16, 29 Law Ed. 746,
19 the court pointed out the distinction between judicial process to seize property such as stolen goods, articles upon which duty is owed to the Government,

articles seized on attachment to satisfy a debt, and the case there at bar, namely, to produce "the invoice of the 29 cases" as to which the Government claimed duty was owed and which it wanted forfeited, held:

> "It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of person security, personal liberty and private property, for that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Cambden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forceable and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of a crime or forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other." (See also *Gouled vs. U. S.*, 255 U.S. 298; *Carrol vs. U. S.*, 267 U.S. 132; *Lefkowitz vs. U. S.*, 285 U.S. 452; *U. S. vs. Rebinowitz*, 339 U.S. 56; *Adel vs. U. S.*, 362 U.S. 217; *Woo Lai Chun vs. U. S.*, 274 Fed. 2d 708 (Ninth Circuit, 1960).)

B) The "general search warrant."

A mere glance at the permissive scope of the search warrant and the inventory of matters and materials taken from the home of the defendant dispels any doubt that the search was not only "evidentiary" in nature, but that the warrant was a "general" search warrant and condemned. (See *Stanford vs. Texas*, 13 Law Ed. 2d 431 (January 18, 1965).)

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron vs. U. S.*, 275 U.S. 192, 196, 72 Law Ed. 2d 231, as cited in *Stanford vs. Texas, supra*, at page 437.

It is also submitted that upon seizure of items not specifically described in the warrant, assuming it were not too general, the entire search must be declared invalid since the validly seized items cannot be severed from the invalidly seized items. See *Marcus vs. Search Warrants*, 367 U.S. 717, 6 Law Ed. 2d 1127.

Respectfully submitted,

/s/ BURTON MARKS

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21 **Exhibits to Notice of Motion**

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

Commissioner's Docket No. 42

Case No. 129

UNITED STATES OF AMERICA

v.

THE PREMISES KNOWN AS ROOM 123 - 8400 SUNSET BLVD., SUNSET TOWERS WEST, LOS ANGELES, CALIFORNIA

SEARCH WARRANT

To any Deputy U. S. Marshal or any Special Agent of the Federal Bureau of Investigation.

Affidavit having been made before me by John Robert Barron that he has reason to believe that on the premises known as Room 123 - 8400 Sunset Blvd., Sunset Towers West, Los Angeles, California, in the Southern District of California there is now being concealed certain property, namely bookmaking records, wagering paraphernalia, including but not limited to, bet slips, betting markers, run down sheets, schedule sheets indicating the lines, adding machines, money, telephones, telephone address listings, which are designed and intended for use as the means of committing criminal offenses in violation of Title 18, United States Code Section 1084, and violations of 441, 4412 and

Section 7203 of the Internal Revenue Code, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant { in the daytime / at any time in the day or night[1] } and making the search and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 25th day of February, 1965.

RUSSELL R. HERMANN,
U. S. Commissioner.

JKV:mao

Certified as a True and Correct Copy of the Original Document which is now on file in this office.

RUSSELL R. HERMANN,
United States Commissioner.

22 I am John Robert Barron, Special Agent of the Federal Bureau of Investigation, assigned to the Los Angeles Office.

For the past two years I have been engaged in the investigating of bookmakers and their activities, and I have a knowledge of the methods and language of the operators.

In October 1964, I received information from confidential informants (who in the past have furnished reliable information) that a New York bookmaker was in the Los Angeles area operating a sports book.

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[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

Surveillance conducted of his activities showed one of his associates to be Charles Katz, also known as Larry Day.

Subsequent investigation determined Charles Katz to be residing at the Sunset Towers West, 8400 Sunset Boulevard, Room 122, in the period February 4, 1965 to February 25, 1965, and to be in contact with gamblers.

A confidential informant who has furnished reliable information in the past, advised that Charles Katz made long distance phone calls from pay phones in the mornings and in the evening hours.

I and Special Agents of the FBI on February 10 and February 11, 1965, observed Charles Katz make phone calls which a representative of the Pacific Telephone Company, Los Angeles advised were made to Boston, Massachusetts, telephone number 254-5266.

Special Agents of the Federal Bureau of Investigation at Boston informed me that Boston telephone number 254-5266 is subscribed to by Harry Green at Apartment 4, 28 Colborne Road, Brighton, Massachusetts. Previous investigation by the FBI in Boston indicated that this apartment is used by Harry Clayton and George Lanzetta, both well known gambling figures, and associates of Elliott Paul Price, currently under federal indictment on bookmaking charges in the Southern District of New York.

On February 19, 20, 21, 23 and 24, 1965, Charles Katz was observed by me and fellow Special Agents to enter either one of two public phone booths located at 8210 Sunset Boulevard, Hollywood, California, which have phone numbers OL 4-9275 and OL 4-9276.

From these booths Charles Katz made daily station to station telephone calls to Boston, Massachusetts, telephone number 884-1733. His conversations were recorded by taping microphones on the outside of the phone booths daily. I have listened to the recordings of his conversations and in his conversations he daily received the basketball line and made wagers with the person using the telephone number he was calling.

On February 23 and 24, 1965, Charles Katz from the described booths called Miami Beach telephone number

JE. 4-0976 and on February 24, 1965, he made sports bets on the Duquesne and Temple basketball games to a party on the Miami number. He used the following language, "Give me Temple 10½ for a nickel and give me Duquesne 7½ for a nickel."

From my experience in investigating violations of the Federal Gambling Statutes I am aware that the above language construed the placing of bets.

23 On February 23, 1965, Special Agent Allen F. Frei of the Federal Bureau of Investigation, Los Angeles, occupied Room 123 of the Sunset Towers West which is adjacent to Room 122 occupied by Charles Katz. SA Frei overheard from his room Katz engage in approximately 15 telephone conversations with unknown persons, indicating he was making sports bets. Based on the information revealed in the investigation and the consistent pattern shown by the defendant in his activities, it is my opinion that defendant is engaged in the business of betting and wagering.

JOHN ROBERT BARRON,
Special Agent,
Federal Bureau of Investigation.

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24 February 25, 1965

The following items were seized by Special Agents Robert R. Rockwell and Leo V. La Rue during execution of a search warrant at Sunset Towers West, 8400 Sunset, Los Angeles, Calif. on this date:

1. One dark blue plastic brief case containing:

1) 148 yellow, legal size sheets of lined paper. Each bears names of colleges and surnames with numbers beside them in columns.

2) One copy 1964 Inside Football, a sport magazine. Between pages 78 and 79 is yellow legal size sheet of paper with names of colleges and various numbers.

3) Newspaper clipping captioned "College Basketball Standings.

Brief case located in upper left hand dresser drawer.

2. Following taken from a blue National Airlines bag on floor of east closet:

25 1) Registration card issued by Las Vegas Police Department, #A-44612 to Charles (NMN) Katz.

2) Newspaper clipping starting with "The Expert: . . ." ending with "games."

3) Sheet of white, heavy paper with red handwriting. At upper left corner "Knicke" at lower right "Day."

3. Following from desk drawer:

1) Large brown envelope containing 7 copies of Sports Journal listing College and pro basketball games.

2) Two rolls of quarters—$10.00 each.

3) Copy of Basketball Yearbook 1965. Inserted between pages 26 and 27 were:

1) White sheet of paper with names of cities and numbers—Marked #1.

2) Clippings from Sports Journal dated February 23, with markings. Marked #2.

3) Six legal size yellow sheets with names of schools. Marked #3 through #8.

4) One yellow legal size sheet marked #9.

26 4. Slip of lined paper with red ink writing. Marked #10.

5. Phone slip. Marked #11. Dated 2/22/65.

6. Phone slip 1/26/65, 6:53 PM. Marked #12.

7. Lined slip with school names and markings. Marked #13.

8. Clipping from Sports Journal 2/22/ with markings. #14.

9. Clipping from Sports Journal dated 2/24 with markings and attached clipping 1/28. #15.

10. Hotel stationery with notations. #16.

11. Legal size card board with phone number. #17.

12. National Airlines Ticket, 1/22/65, serial #147560. #18.

13. Envelope with markings. #19.

LEO V. LA RUE, *Special Agent,*
FBI Los Angeles 2/25/65

ROBERT R. ROCKWELL, *Special Agent,*
FBI Los Angeles 2/25/65

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27 **Proof of Service by Mail**

(Omitted in printing)

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28 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

(Title omitted)

No. 34715 Criminal

Minutes of the Court—April 5, 1965

At: Los Angeles, Calif.

PRESENT: Hon. JESSE W. CURTIS, District Judge

Deputy Clerk: Leonard Brosnan Reporter: Jack Ellis

U. S. Atty, by Assistant U. S. Atty: Stephen Miller

Defendant on bond Counsel: Burton Marks

PROCEEDINGS: ARRAIGNMENT AND PLEA.

Court orders all documents filed in Miscellaneous 1209 be incorporated herein. Filed defendant's Notice of Motion and Motion to Suppress Evidence and for return of evidence with points and authorities in support.

29 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

(Title omitted)

No. 34715 Criminal

Minutes of the Court—April 5, 1965

At: Los Angeles, Calif.

PRESENT: Hon. JESSE W. CURTIS, District Judge

Deputy Clerk: N. E. Brockman Reporter: Jack Ellis

U. S. Atty, by Assistant U. S. Atty: Benj. S. Farber

Defendant on bond Counsel: Burton Marks

PROCEEDINGS: HEARING defendant's motion to suppress evidence:

Attorney for Government makes opening statement to the Court. Government's exhibits 1 through 20 are marked for identification. Allen Frei is called, sworn and testifies for Defendant.

Emmett Douherty is called, sworn and testifies for the Government. Leo V. LaRue is called, sworn and testifies for the Government. Government's exhibits 7 through 12, and 14 through 20 heretofore marked and admitted.

John R. Barron is called, sworn and testifies for the Government. Government's exhibits 1 through 6 theretofore marked are admitted.

Counsel for both sides make arguments to the Court.

Court takes under submission and orders case continued to April 13, 1965, 1:30 P.M. for rendering ruling.

(File endorsement omitted)

30 IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

(Title omitted)

Commissioner's Docket No. 42

Case No. 129

No. 34715-CD

Opposition to Defendant's Motion for Suppression of Evidence and for Return of Evidence; and Memorandum of Points and Authorities—Filed March 29, 1965

The United States of America opposes defendant CHARLES KATZ's Motion for Suppression of Evidence and for Return of Evidence on the ground that he is not legally entitled to such relief. This Opposition is based on all of the records pertaining to the above entitled case which have been filed with the Court and on the attached Memorandum of Points and Authorities.

Respectfully submitted,

MANUEL L. REAL
United States Attorney

JOHN K. VAN DE KAMP
Assistant United States Attorney
Chief, Criminal Division

BENJAMIN S. FARBER
Assistant United States Attorney

/s/ BENJAMIN S. FARBER
Attorneys for
United States of America

31 **Memorandum of Points and Authorities**

I. FACTS

For the purposes of this memorandum, and to assist the Court in its determination of the legal questions presented, we will set out the facts which we anticipate will be proven during the hearing on this motion.

It will be demonstrated that as the result of confidential information, the Federal Bureau of Investigation commenced visual surveillance of defendant CHARLES KATZ's activities. Through surveillance and confidential information, it was determined that KATZ placed telephone calls from certain public telephone booths during set hours on an almost daily basis. From a check of the telephone company records, it was determined that some of these telephone calls were being placed to a telephone number in Massachusetts which was listed to an individual who was well known as a gambler to the Federal Bureau of Investigation.

On February 19, 1965, Special Agents of the Federal Bureau of Investigation observed KATZ as he left his residence. The agents who were in visual contact with KATZ signaled other agents who were waiting at the twin telephone booths normally used by KATZ. The Special Agents who were at the telephone booths attached to the outside of the telephone booths a microphone which lead to a tape recorder. At no time was there any penetration into the interior of the booth or indeed into the wall at all. Permission had previously been obtained from the telephone company to make such an attachment. As soon as KATZ left the vicinity of the telephone booth, Special Agents of the Federal Bureau of Investigation detached the microphone and wire recorder. This procedure was followed every day from February 19th to February 25th, 1965. A study of the tapes which were obtained revealed conversations having to do with the placing of bets and obtaining gambling information on the part of defendant KATZ.

32 Special Agent Allan Frei rented a room adjacent to the residence of CHARLES KATZ on February 23, 1965. That day he listened without the assistance of

electronic equipment to conversations emanating from KATZ's room which he could hear through their common wall. Some of those conversations pertained to gambling and betting.

As a result of listening to the tapes and the conversations overheard by Special Agent Frei, the agents sought and obtained a search warrant to authorize a search of defendant KATZ's residence for "bookmaking records, wagering paraphernalia, including but not limited to bet slips, betting markers, run down sheets, schedule sheets indicating the line, adding machines, money, telephones, telephone address listings". As a result of the search, certain items were taken from defendant KATZ's room. They are set out in full in the Appendix to defendant KATZ's Points and Authorities, and we will not repeat them here.

Defendant KATZ seeks the return of those items which were seized and for suppression of all conversations overheard by the Special Agents. We do not think he is entitled to that relief for the following reasons:

II. ELECTRONIC SURVEILLANCE OF THE TELEPHONE BOOTH USED BY DEFENDANT KATZ DID NOT VIOLATE THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. *There was no trespass or physical intrusion into a Constitutionally protected area.*

Under the facts of this case, since there was no physical intrusion or trespass on property belonging to the defendant, it is respectfully submitted that the rationale of *Goldman* v. *United States,* 316 U.S. 129 (1942), should preclude suppression of the statements overheard in the telephone booth.

In that case, Federal agents placed a detectaphone against the outside wall of the defendant's office
33 and overheard the conversations taking place within. The United States Supreme Court upheld the conviction and pointed out that there was no trespass or illegal intrusion into the defendant's office and therefore no illegal search and seizure. At page 135, the court said:

> "We hold that the use of the detectaphone by Government agents was not a violation of the Fourth Amendment.

"In asking us to hold that the information obtained was obtained in violation of the Fourth Amendment, and that its use at the trial was, therefore, banned by the Amendment, the petitioners recognize that they must reckon with our decision in *Olmstead* v. *United States,* 277 U.S. 438. They argue that the case may be distinguished. The suggested ground of distinction is that the *Olmstead* case dealt with the tapping of telephone wires, and the court adverted to the fact that, in using a telephone, the speaker projects his voice beyond the confines of his home or office and, therefore, assumes the risk that his message may be intercepted. It is urged that where, as in the present case, one talks in his own office, and intends his conversation to be confined within the four walls of the room, he does not intend his voice shall go beyond those walls and it is not to be assumed he takes the risk of someone's use of a delicate detector in the next room. We think, however, the distinction is too nice for practical application of the Constitutional guarantee, and no reasonable or logical distinction can be drawn between what federal agents did in the present case and state officers did in the *Olmstead* case."

Olmstead v. *United States,* 277 U.S. 438 (1928), cited as the basis for the decision in *Goldman, supra,* was
33a decided on the ground that no trespass took place within the property belonging to the defendant. On the other hand, in *Silverman* v. *United States,* 365 U.S. 505 (1961), the United States Supreme Court held that police officers did indeed violate the Fourth Amendment to the United States Constitution when they drove a spike mike into a party wall of defendant's house, coming in contact with a heating duct which turned the entire house into one large electronic receiver. At page 511 of its Opinion, the court distinguished the facts in *Silverman, supra,* from those in *Olmstead, supra,* using these words:

"Here, by contrast, the officers overheard the petitioners' conversations only by usurping part of the petitioners' house or office—a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without

their knowledge and without their consent. In these circumstances we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law."

Contrary to defendant's assertion, both *Olmstead, supra,* and *Goldman, supra,* do have vitality today. See *Silverman* v. *United States, supra,* at page 512, in which it was said: "We find no occasion to re-examine *Goldman* here, but we decline to go beyond it, by even a fraction of an inch."

See also: *Lopez* v. *United States,* 373 U.S. 427 (1963), at pages 438-439:

"The Court has in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable
34 government agents to overhear conversations which would have been beyond the reach of the human ear. See, *e.g., Olmstead* v. *United States,* 277 U.S. 438; *Goldman* v. *United States,* 316 U.S. 129. It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area. *Silverman* v. *United States, supra.*"

People v. *Benson,* 336 F.2d 791 (9th Cir. 1964), pages 795-796;

Cullins v. *Wainwright,* 328 F.2d 481, 482 (5th Cir. 1964).

B. *In any event, a public telephone booth is not a constitutionally protected area.*

It should be noted that in all of the cases cited above, the question presented pertained to either the defendant's home or office and this appears to be the focal point of the Court. Basically, the Court is concerned with invasion of privacy that may reveal the secrets of the home or office. See the concurring Opinion of Justice Douglas in *Silverman* v. *United States,* 365 U.S. 505 (1961), at page

513, where he discusses the problem in terms of the "intimacies of the home". But in the case at bar, the microphones were attached to a public telephone booth. It would seem that a person who uses a public telephone booth knowingly runs a considerable risk that his conversation will be overheard by the public at large through the thin walls and door of the booth. The Southern District of New York had an opportunity to decide a case which was strikingly similar in its facts. See *United States* v. *Borgese*, 235 F. Supp. 286 (S.D. N.Y. 1964). In that case Federal agents placed a microphone inside a telephone booth and overheard conversations pertaining to gambling. In upholding the action of the agents against attack on Constitutional grounds, the Court said at page 294:

35 "'Nor does a public telephone booth seem to be a 'constitutionally protected area', the expression used in Lopez v. United States, above."

"The area in which privacy is guaranteed by the Fourth Amendment is essentially the 'houses of people, extended to include their offices' . . . ."

The rationale of *Borgese, supra,* may well be of assistance to this Court.

III. The Conversations Emanating From Defendant Katz's Room, Which Were Overheard By a Federal Agent in an Adjoining Room, Were Not Constitutionally Protected.

As pointed out above, it is anticipated that evidence will demonstrate that Special Agent Frei took a room adjoining that of defendant Katz and on February 23, 1965 overheard certain conversations without the use of electronic equipment. For the reasons stated above, we believe that *Goldman* v. *United States,* 316 U.S. 129 (1942), controls the instant situations. In addition, since no electronic equipment was used at all, it is doubtful that under any rational could it be considered that there was an illegal search and seizure. See *United States* v. *Hester,* 265 U.S. 57 (1924); Justice Burton's dissent: *On Lee* v. *United States,* 343 U.S. 747, 766-767 (1951).

36 IV. THE SEARCH WARRANT UTILIZED IN THIS CASE WAS A VALID SEARCH WARRANT.

The search warrant stated with particularity the items to be seized: "bookmaking records, wagering paraphernalia, including but not limited to bet slips, betting markers, run down sheets, schedule sheets indicating the line, adding machines, money, telephones, telephone address listings."

In *United States* v. *Clancy*, 276 F.2d 617, 624 (7th Circuit 1960), reversed and remanded on other grounds, 365 U.S. 312 (1961), the Court upheld a search warrant containing similar language:

> "'* * * divers records, to wit books, memorandum, tickets, pads, tablets and papers recording the receipt of money from and the money paid out in connection with the operation of a wagering business on said premises, such files, desks, tables and receptacles for the storing of the books, memoranda, tickets, pads, tablets and papers aforesaid, and divers receptacles in the nature of envelopes in which there is kept money won by patrons * * * and divers other tools, instruments, apparatus, United States currency and records * * *.'"

In considering the above language that Court said at page 629:

> "That the articles to be seized by virtue of the search warrant were described with sufficient particularity, can hardly be questioned in view of the authorities. Nuckols v. United States, 1938, 69 App. D.C. 120, 99 F.2d 353, 355, certiorari denied, Floratos v. United States, 305 U.S. 626, 59 S.Ct. 89, 83 L.Ed. 401; Merritt v. United States, 6 Cir., 1957, 249 F.2d 19; see also, Clay v. United States, 5 Cir., 1957, 246 F.2d 298, certiorari denied, 355 U.S. 863, 78 S.Ct. 96, 2 L.Ed. 2d 69.

37 "In the Nuckols case, supra, a search warrant was held sufficient which commanded the seizure of '* * * gaming tables, gambling devices, race horse slips, and gambling paraphernalia * * *.' The court said, 99 F.2d at page 355:

> 'In the search of a gambling establishment the same descriptive particularity is not necessary as in the case of stolen goods.'
>
> And in Merritt v. United States, supra, 249 F.2d at page 20, the court approved affidavits for a search warrant, and the search warrant, where the affidavits described only '* * * lottery tickets and other paraphernalia "which will indicate a numbers operation is being conducted on the premises."'"

The next problem with respect to the search is raised by the defendant's assertion that the items taken from him were mere evidence and thus suppressible. It is the Government's contention that while the items taken were evidence, they also were instrumentalities of a crime and thus could be properly seized and used against the defendant. In *Marron* v. *United States,* 275 U.S. 192 (1927), the Court held that certain books and records pertinent to a bootlegging business were rightfully seized. At page 199 the Court said:

> "And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. And, while it was not on Birdsall's person at the time of his arrest, it was in his immediate possession and control. The authority of officers to search and seize the things by which the nuisance was being maintained, extended
> 38 to all parts of the premises used for the unlawful purpose. Cf. Sayers v. United States, 2 F. (2d) 146; Kirvin v. United States, supra; United States v. Kirschenblatt, supra. The bills for gas, electric light, water and telephone services disclosed items of expense; they were convenient, if not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest."

Likewise, in *Clancy* v. *United States,* 276 F.2d 617 (7th Cir. 1960), books, records and papers pertaining to a book-

making operation were held to be instrumentalities of the crime.

See also: *United States* v. *$1,058.00 in United States Currency*, 210 F. Supp. 45, 51 (W.D. Pa. 1962), affirmed without discussion of the points pertinent to this case, 323 F.2d 211 (3rd Cir. 1963).

For the reasons mentioned in *Clancy* v. *United States, supra,* at page 630, we believe that *Takahashi* v. *United States,* 143 F.2d 118 (9th Cir. 1944) is inapposite. In that case the Court found that certain books which had been seized were merely evidence of an intent to export certain items subsequent to the making of fraudulent statements to the Department of State. Thus the Court found that the books and records themselves were not instrumentalities of the crime.

Likewise, *Gilbert* v. *United States,* 291 F.2d 586 (9th Circuit 1961), has no application to this case, since the items seized in that case were merely checks and income tax returns—not being instrumentalities of the crime charged, which was forgery. The Court pointed out at page 597 that if a conspiracy had been charged, then
39 the items might well have been seized as instrumentalities of a crime.

In the case at bar, records seized were necessary to the defendant for him to carry on his business of betting. He has made such an admission to the Special Agents—as will be demonstrated by testimony. Rather, this case appears to fall within the rule of *Leahy* v. *United States,* 272 F.2d 487 (9th Cir. 1959), where the Court said at page 491:

". . . The revenue agents in the instant case seized an adding machine, a telephone, record books, receipts, pencils, pens, money and the keys to safety deposit boxes, as well as a number of rifles, shotguns and pistols. It is clear from the items seized that the search was specifically directed to the instrumentalities used in the commission of the crime of unlawfully engaging in the business of wagering. The records of an illicit business are instrumentalities of crime. Marron v. United States, 1927, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed 231 (officers incident to arrest may law-

fully seize account books and papers used in carrying on the criminal enterprise). Such were the records obtained in this case. The search was, therefore, a reasonable one. Harris v. United States, supra. . . .

For all of the above reasons, the Government respectfully submits that defendant KATZ's motion should be denied.

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40 **Certificate of Service by Mail**

(Omitted in printing)

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41 **Transcript of Record**

42-43 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

HONORABLE JESSE W. CURTIS, JUDGE PRESIDING

No. 34715-CD

UNITED STATES OF AMERICA, *Plaintiff*,

v.

CHARLES KATZ, *Defendant*.

---

44 **Transcript of Hearing on Motion to Suppress Evidence**

LOS ANGELES, CALIFORNIA, MONDAY, APRIL 5, 1965, 10:00 A.M.

Appearances:

For the Plaintiff: MANUEL L. REAL
United States Attorney

BENJAMIN S. FARBER
Assistant United States Attorney
762 Federal Building
Los Angeles, California 90012

For the Defendant: BURTON MARKS, Esq.
8447 Wilshire Boulevard
Beverly Hills, California

(Other matters heard.)

The Clerk: U.S.A. v. Katz, 34715.

Mr. Farber: Benjamin S. Farber for the Government, your Honor. The Government is ready to proceed.

Mr. Marks: Ready for the moving party, ready to proceed.

I believe the Government is going to offer a stipulation of facts, your Honor, as to most of the facts.

I would like to note a slight change in my points and authorities; page 4, line 22, reads:

"Surely a man has as much right to bet alone . . ." The word should be ". . . be let alone . . ."

The Court: What page and line?

Mr. Marks: Page 4, line 22. It is a typographical error.

The Court: Yes.

Mr. Marks: You want to propose the stipulation?

Mr. Farber: Yes. If the court desires us to proceed, your Honor, I will.

The Court: Yes, if you will, please.

Mr. Farber: For the purposes of this motion only, your Honor, the following facts are stipulated between the defendant and the Government:

45 1. That agents of the Federal Bureau of Investigation commenced visual surveillance of the defendant Charles Katz' activities approximately ten days before February 19, 1965. Through visual surveillance and confidential information it was determined that the defendant Katz placed telephone calls from certain public telephones during set hours on an almost daily basis. From a check of telephone records it was determined that some of these telephone calls were being placed to a telephone number in Massachusetts which was listed to an individual whose reputation was well known to the Federal Bureau of Investigation as that of a gambler;

That on February 19, 1965, special agents of the Federal Bureau of Investigation observed defendant Katz as he left his residence;

That certain special agents of the Federal Bureau of Investigation who were in visual contact with defendant Katz signaled to certain other agents who were waiting at the twin telephone booths normally used by Katz that Katz was on his way.

That the special agents who were at the twin telephone booths—strike that.

That the special agents who were at the twin telephone booths attached to the outside of the telephone booths a microphone which led to a tape recorder. The
46 actual attaching was done upon receipt of a signal that defendant Katz was approximately a half a block from the booths;

That at the time that the microphones were attached to the twin telephone booths there was no penetration whatsoever inside the telephone booths, they were attached to the outside of the telephone booths by tape so that there was not even the penetration of a screw attaching the microphones to the telephone booths;

That permission had previously been obtained from the telephone company to make such attachments to the telephone company's property;

That as soon as defendant Katz left the vicinity of the twin telephone booths special agents of the Federal Bureau of Investigation detached the microphone and the wire recorder. This same procedure was followed every day from February 19th to February 25th, 1965;

That tapes of conversations were obtained on every day from February 19th to February 25th, 1965, with the exception of February 22, 1965, when through mechanical difficulty there was no recording of the conversation.

A study of the tapes which were obtained revealed conversations having to do with the placing of bets and obtaining of gambling information on the part of defendant Katz;

That Special Agent Allen Frei rented a room
47 adjacent to the residence of Charles Katz on February 23, 1965;

That on February 23, 1965, from the time that Special Agent Allen Frei entered the room adjacent to that of defendant Katz until approximately 8:00 o'clock he listened to conversations emanating from Katz' room which he could hear through a common wall, but during that whole time period he used no electronic equipment whatsoever;

That as a result of special agents reviewing the tapes obtained from the telephone booths and the conversations overheard by Special Agent Frei, the special agents of the

FBI sought and obtained a search warrant to authorize a search of defendant Katz' residence for "bookmaking records, wagering paraphernalia, including but not limited to, bet slips, betting markers, run-down sheets, schedule sheets indicating the lines, adding machines, money, telephones, telephone address listings;

That as a result of the search certain items were taken from defendant Katz' room.

Actually, your Honor, those items are set out in full in an appendix to the defendant's motion. They also will be presented to the court as exhibits.

As far as we have gone, is that stipulated?

Mr. Marks: Yes, so stipulated.

Mr. Farber: We have a further stipulation.
48 Exhibits 1 through 6, your Honor, are transcripts of the tapes which were obtained through the use of the wire recorder and the microphone. May it be stipulated that they be used for the purpose of this motion?

Mr. Marks: Yes.

The Court: Very well.

Mr. Marks: And I would like to further stipulate that the copy of the search warrant attached to my moving papers and the copy of the affidavit of John Robert Barron which is also attached to the moving papers is a true and accurate copy of the search warrant and the affidavit in support thereof.

Mr. Farber: Yes, I believe actually the search warrant is a part of the record, is it not, your Honor?

The Court: Yes.

Mr. Marks: I believe you were going to call a witness.

Mr. Farber: Your Honor, how would the court like us to proceed? Of course, the defendant is the moving party. I will be glad to put on witnesses both as to the question—

The Court: What area do you wish to explore now, counsel?

Mr. Marks: Well, I would like to explore Mr. Frei as to how he heard the conversations, even though it wasn't electronically obtained, in the next door room,
49 whether it was by mechanical amplification—

The Court: Mr. Frei will step forward and take the stand, please.

Mr. Farber: Your Honor, before Mr. Frei actually begins to testify may I lodge with the clerk Exhibits 1

through 20? They have exhibit slips on them. May they be deemed marked for identification?

The Court: They may.

(The exhibits referred to were marked Plaintiff's Exhibits 1 through 20 for identification.)

Mr. Marks: Might I reach a further point, your Honor? It's been agreed through Government counsel and myself that I requested of Government counsel on behalf of my client to be able to copy and have copies of the exhibits, of the matters seized returned. The Government has resisted this on this basis—and that will be part of our argument—that they are instrumentalities of the crime. So we have sort of generally agreed that we will present this question to the court, that if the court finds that they are instrumentalities, does that of itself prevent the defendant from obtaining copies of his own work? Or perhaps the court can give some guidance.

Mr. Farber: At some time during the proceeding, your Honor, we think that would be an appropriate question for the court to determine.

50 The Court: Very well.

ALLEN F. FREI,

called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

The Clerk: State your name for the record.

The Witness: Allen F. Frei.

Direct Examination

By Mr. Marks:

Q. Mr. Frei, I believe you are a special agent with the Federal Bureau of Investigation? A. That is right, sir.

Q. And to get right to the meat of it, on or about February 23, 1965, you occupied a room adjacent to the room of Mr. Katz, I believe; is that correct? A. Correct.

Q. Was Room No. 122 the— A. I believe so, yes.

Q. And had you occupied that room before the 23rd? A. No, sir; I moved in about 11:00 o'clock in the morning of that date.

Q. Did you use any electronic equipment on any other date to overhear conversations?

Mr. Farber: I object to that question, your Honor. I would represent to the court that the only evidence that we intend to use at the time of trial or at any other
51 time with respect to this proceeding is the evidence that was obtained between the hours of 11:00 o'clock in the morning and 8:00 o'clock in the evening, February 23rd.

We believe that whether or not electronic equipment was used subsequent to that time would be irrelevant and immaterial. We would ask the court in making this order to, if it deems fit, order that any evidence obtained by Mr. Frei after February 23rd, 8:00 o'clock in the evening, not be received in evidence and that way we think that we are making it as simple as possible and not clouding the issue.

The Court: Are you agreeable to that?

Mr. Marks: In a fashion. Of course, your Honor, I can't object to them not introducing evidence that—

The Court: They don't want to introduce.

Mr. Marks: That's right.

Q. Mr. Frei, with respect to the conversations that you overheard on February 23, 1965, this was from about 11:00 in the morning until 8:00 at night; is that correct? A. Yes, sir.

Q. And you heard about fifteen conversations? A. In the course of the day I heard him make or receive approximately fifteen telephone calls of which I could hear portions of the conversation.

Q. You could not hear the entire conversations;
52 is that correct? A. Not verbatim, no, sir.

Q. So you didn't know to whom or where from these were coming? A. No, sir.

Q. Were you able to hear audibly all of the conversations? A. Parts of all the conversations.

Q. Well, did you make notes of the parts that you could hear? A. Yes, sir.

Q. And were those transcribed? A. Well, my longhand notes. They were not transcribed otherwise.

Q. Did you hear these? What, did you put your ear to the wall? A. There is a—in the mutual wall separating Mr. Katz' apartment from my room was an electrical outlet which appeared to be—electrical outlet that came out in my room also, perhaps, came out in his room, by placing

my ear exactly over the electrical outlet I could hear parts of his conversations.

Q. You didn't use any bundle of paper or anything to help amplify or select the— A. I used a drinking glass, which was in my bathroom, inverted.

53 Q. Put that over the receptacle? A. And it didn't work.

Q. Was this receptacle on the floor? A. No, sir; it was approximately waist high to a six-foot gentleman.

Q. Well, how would you be notified that it was time to put your ear to the receptacle? You certainly didn't hold it there for nine hours, did you? A. No, sir. When I moved into the room at 11:00 o'clock Mr. Katz was in the patio enjoying the sunshine, and I could then, of course, hear all conversation extremely clearly through my open window, he being approximately ten feet away from me.

Q. Was he on the phone at that time in the patio? A. During some parts of the day, yes, sir. But I could also hear that the phone rang through my open window in that manner, and then I would place my ear there.

Q. You certainly didn't hear Mr. Katz place any bets or receive any bets on that date, did you? A. I heard—to answer your question, as to making or placing bets I would not have the knowledge. What I did hear was Mr. Katz make numerous references to—or state "Philadelphia," "Northwestern" and comments to the effect that "I have Northwestern minus 7."

54 Q. In other words— A. Or "Oregon plus 4," things of that type.

Q. Is it a true statement that what he was talking about was either general talking about games that were being played and stating to the person or persons unknown that he had already bet on a certain game in a certain way? A. I would—that would call for an assumption on my part. I can testify only that I heard him say to the effect, "I have Northwestern and 8." Those are not exact quotations, but statements of that sort.

Q. Did you ever hear him say words to the effect to somebody on the phone, "Give me Northwestern and 8" which would indicate to you in your opinion that he was placing a bet? A. No, sir.

Mr. Marks: Thank you. I believe that's all of this witness, your Honor.

The Court: Do you have any examination?
Mr. Farber: Yes; just a little, your Honor.

Cross Examination

By Mr. Farber:

Q. Sir, would you tell us what was the conversation that you did overhear pertaining—or the bits that you have already mentioned, "Oregon plus 8" and any other conversations that you did hear which pertained to sporting events? A. In one of the conversations there was a discussion—

55 Q. Approximately what time was this conversation? A. To the best of my recollection, approximately 3:00 in the afternoon.

Q. All right. What was the conversation? A. A conversation to the effect that they were discussing—apparently the person he was talking to over the phone were (sic) discussing the line, and he made a statement to the effect "Don't worry about the line. I have phoned Boston three times about it today."

There was apparently a discussion or concern about some money. There Katz mentioned, "Don't worry about," I believe the name was "Sammy" or a name similar to Sammy. "He is the most honorable gentleman in the country."

Other than their discussion as to a plus or minus on certain teams that's about the extent of it.

Mr. Farber: Thank you. I have nothing further of this witness, your Honor.

Mr. Marks: Nothing further.

The Court: You may step down.

Mr. Farber: The Government calls as its next witness—excuse me, counsel. Do you have any other witnesses you want to call?

Mr. Marks: No.

Mr. Farber: The Government calls as its next witness Mr. Emmett Doherty.

called as a witness by the plaintiff, having been first duly sworn, testified as follows:

The Clerk: State your name for the record.
The Witness: Emmett Doherty.

Direct Examination

By Mr. Farber:

Q. Mr. Doherty, you are a special agent of the Federal Bureau of Investigation? A. Yes.

Q. And for how long have you been so employed? A. Seventeen years.

Q. Now, sir, have you been active in the investigation of defendant Charles Katz? A. Yes, I have.

Q. Now, were you present at the arrest of defendant Charles Katz? A. Yes, I was.

Q. And at that time, sir, was there a search made of defendant Charles Katz? A. Yes, there was.

Q. Incidentally, was that pursuant to a warrant of arrest? A. Yes, it was.

Q. Now, at the time of defendant Charles Katz' arrest were any items taken from his person? A. Yes.

57

Q. Sir, I'd like you to take a look at Government's Exhibit 13, please.

Mr. Marks: May I approach the witness and look at it with him?

The Court: Yes.

By Mr. Farber:

Q. Have you had an opportunity to take a look at Government's Exhibit 13? A. Yes, I have.

Q. And is Government's 13 an item you took off the person of defendant Charles Katz? A. Yes, it is.

Q. And that was pursuant to the arrest? A. Yes.

Mr. Farber: I move Government's Exhibit 13 be received for purposes of this hearing, your Honor.

The Court: It may be admitted.

Mr. Marks: We offer the same objection, your Honor, as to the other exhibits on the ground the arrest was unlawful; even though there was a warrant of arrest, that the search

was not incidental to the arrest and the evidence is irrelevant and immaterial.

The Court: Well, very well. It will be overruled.

58 (The exhibit marked Plaintiff's Exhibit 13 was received in evidence.)

By Mr. Farber:

Q. Now, what is Government's Exhibit 13? A. It is a section out of a sports line sheet dated Thursday, February 25th, listing two college games and then listing Southern Conference games.

Q. I am sorry, Mr. Doherty. Can you speak up a little louder? A. It's a sport line sheet dated February—Thursday, February 25th, listing a couple of college games plus the Southern Conference schedule games.

Q. And are there certain notations? A. Yes, there are.

Q. And what are those notations? Not the exact figures. A. Numerical digits listed behind the names of the schools.

Q. Are they some sort of record? A. Pardon?

Q. Are they some sort of record? A. Yes.

Q. What sort of record, if you know?

Mr. Marks: Objected to as calling for a conclusion. Is this what you want me to stipulate?

59 Mr. Farber: I think the objection is well taken.

The Witness: They are—

By Mr. Farber:

Q. Now, at the time of—

I withdraw that question, your Honor.

Now, at the time of the arrest, Dr. Doherty, did you advise defendant Katz of his rights? A. Yes.

Q. And what did you tell him? A. I told him he did not have to make any statement, that any statements that he did make could be used against him in a court of law; that he was entitled to an attorney. That's it.

Q. Did he say whether or not he understood that advice? A. He nodded that he understood.

Q. Now, sir, subsequent to the arrest of the defendant Katz did you have an occasion to see him again? A. Yes, I did.

Q. When was that? A. That was on the following day.

Q. And was anybody else present? A. Yes.

Q. Who? A. Agent Donovan.

60 Q. Where? A. At the Sunset Towers West in Los Angeles.

Q. Was that defendant Katz' residence? A. Yes.

Q. For what purpose were you there? A. We were there to return a fingernail file and some paper clips which we failed to—not paper clips but fingernail clippers which we failed to give him back the day before.

Q. At that time did you have a conversation with defendant Katz? A. Yes, we did.

Q. Who initiated the conversation, you or he? A. Well, to initiate—we called him to begin with and met him in the lobby. So in effect we had initiated it.

But while we were talking to him he asked if there would be any possibility of him getting his records back.

Q. May I show you Government's Exhibit No. 7 for identification. Government's Exhibit 7, I believe, is the folder.

Would you take a look at the contents in Government's Exhibit 7? Are those the records? A. Yes.

Mr. Marks: Just a minute. I object to that as

61 calling for a conclusion.

Mr. Farber: If you know.

Mr. Marks: I object to that as calling for a conclusion. We are now going from a conversation which I wanted to object to, your Honor, because it doesn't appear that on the date—date following the arrest the agent visited the defendant and such advice was given as to his right to remain silent.

The Court: I don't think he has to repeat it every time.

Mr. Marks: I think he might have to in this situation where he has already been placed under arrest.

The Court: The objection will be overrulel.

Mr. Farber: Let me ask this question, too, so there will be two separate points for the court's consideration.

Q. With respect to the records, who initiated the conversation pertaining to the records? A. Mr. Katz.

Q. Did you and Mr. Donovan or did Mr. Katz? A. No; Mr. Katz initiated it.

Q. All right. What did he say pertaining to the records? A. He said that these records involved a great deal of

work on his part, that he couldn't replace them,
62 that he needed the records—he needed the records,
and that if he had the records back that he would continue to bet.

Then he facetiously made some remark: "And if I continue to bet then you will be able to get the big fellows." But this "big fellows" remark wasn't a sincere type of remark.

Mr. Farber: Thank you. I have nothing further of this witness.

Cross Examination

By Mr. Marks:

Q. Did you have those records with you? A. No.

Q. Well, what did he say when he said, "May I have my records back"? A. He was—

Q. Or words to that effect? A. He was referring to the records, I believe—might have been handicap sheets mentioned. But anyhow there was a complete understanding between us as to what records he was talking about.

Mr. Marks: I move to strike that as unresponsive, your Honor.

The Court: It may go out.

By Mr. Marks:

Q. What did Mr. Katz say when he asked you for
63 the items which had been seized? A. He asked for his records.

Q. Did he use the word "records"? A. Yes.

Q. Now—I am sorry. Had you finished? A. I just can't quite recall exactly what the terminology was, but he asked for his records. And it was pertaining to the amount of work in regard to the basketball records.

Q. Basketball records? A. Yes.

Q. Let me see if I get this correct. You came to his apartment on the day after the arrest? A. We came to the apartment house, not to his—

Q. And you called up to him on the phone? A. Yes.

Q. And said, "Charlie, we took your nail clippers by mistake, we'd like to give them back to you"? A. Right. I didn't make the call, it would be—

Q. Words to that effect? A. Yes; I presume.

Q. Now, the purpose of going there was solely to return his nail clippers, not to obtain any admissions or incriminating statements; is that correct? A. That is right.

Q. And he came down to the lobby and he said, "Instead of nail clippers why don't you give me my records
64 back." Right? A. He said—yes.

Q. All right. A. "I can replace these for 35 cents but I can't replace the records."

Q. Right. He said that those—that the documents that you had taken he had spent about 30 years in preparing; isn't that correct? A. Words to that effect, yes.

Q. Those were the results of 30 years of work? A. Yes.

Mr. Marks: All right. Thank you. That's all.

Mr. Farber: Excuse me. I just want to ask one question.

Redirect Examination

By Mr. Farber:

Q. Government's Exhibit 7, are those basketball records, if you know? A. Yes. They appear to be basketball records.

Mr. Farber: Thank you. I have nothing further, your Honor, of this witness.

The Government calls as its next witness Mr. Donovan.

65. TIMOTHY L. DONOVAN,

called as a witness by the plaintiff, having been first duly sworn, testified as follows:

The Clerk: State your name for the record.

The Witness: Timothy L. Donovan.

Direct Examination

By Mr. Farber:

Q. Now, Mr. Donovan, were you present with Mr. Doherty on the day that he went to the residence of Mr. Katz to return the nail clippers? A. Yes, I was.

Q. And was there a conversation with Mr. Katz pertaining to certain records? A. Yes, there was.

Q. And would you tell us what that conversation was, sir?

Mr. Marks: May I make the same objection, your Honor, as heretofore raised? No showing that the statements were volunteered or that the person who once having been ar-

rested was advised of his rights to be silent and his right to an attorney.

The Court: Overruled.

Mr. Farber: Thank you, your Honor.

The Witness: I telephonically contacted Mr. Katz advising him that I had in my possession a nail file and a
66 nail clipper which had been taken from him on the previous day and I wished to return them to him. Mr. Katz volunteered that he would come to the lobby to meet Mr. Doherty and myself, and he did so.

I personally gave Mr. Katz the two items in question. Mr. Katz commented, "These only cost 35 cents. I can replace these. Can I have my records?"

Q. Did he specify what records, do you recollect? A. No, he did not.

Q. Go ahead. A. Mr. Katz continued concerning his records that it took years and years of labor and research to compile them and without them he was out of business.

Q. Did he say what business? A. Mr. Katz indicated he had been a handicapper and bettor all his life. Mr. Katz was advised that agents of the Federal Bureau of Investigation had no authority concerning the disposition of the sheets at that time and that his attorney should contact the United States Attorney.

Q. Now, we talked about records that were seized. To your knowledge were certain records, certain items taken from Mr. Katz the day prior to your going to his residence with the nail clipper and the nail file?

Mr. Marks: Stipulated the items contained in the—

Mr. Farber: Search warrant?

67 Mr. Marks: —in the return sheet.

Mr. Farber: Fine. I will accept that stipulation and will no longer question.

Thank you. I have no further questions of Mr. Donovan, your Honor.

Cross Examination

By Mr. Marks:

Q. Mr. Donovan, you didn't help conduct the search, did you? A. I did not, sir.

Mr. Marks: Thank you.

The Court: You may step down.

Mr. Farber: The Government calls Mr. LaRue.

68 LEO V. LaRUE,

called as a witness by the plaintiff, having been first duly sworn, testified as follows:

The Clerk: State your name for the record.
The Witness: Leo V. LaRue.

Direct Examination

By Mr. Farber:

Q. What is your occupation, sir? A. I am a special agent with the FBI.

Q. Now, Mr. LaRue, how long have you been so employed? A. Twelve years.

Q. Have you been engaged in the investigation of defendant Charles Katz? A. Yes, I have.

Q. Was it you who actually executed the search warrant? A. Yes.

Q. And what was the date of the execution, sir? A. On the 25th. February 25th.

Q. Did you pick up certain items— A. Yes.

Q. —from Mr. Katz? A. Yes, I did.

Mr. Farber: May it be stipulated, counsel, that the items that were picked up from Mr. Katz were Exhibits 7 through 20 with the exception of Exhibit 13?

69 Mr. Marks: Well, I will stipulate that the items picked up were the ones that are in evidence—or, to be produced as numbered were taken from Mr. Katz. However, I will not stipulate to the designation given to them on the evidence—

Mr. Farber: Well, it's just—you know, we just mark them for exhibit so we will all be talking about the same items.

Mr. Marks: As far as the numbers are concerned I will so stipulate.

Mr. Farber: Then, your Honor, is the stipulation clear for the record?

The Court: Yes.

Mr. Farber: Or shall I repeat it again?

The Court: Well, perhaps you had better.

Mr. Farber: All right. It is stipulated that Exhibits 7 through 20, with the exception of Exhibit 13, were received by Special Agent Leo LaRue on February 25th from the

premises of Charles Katz pursuant to a search warrant that he executed. Is that so stipulated?

Mr. Marks: Stipulated only that they were taken from the apartment and may or may not have been pursuant to a search warrant.

Mr. Farber: I will accept the stipulation.

Your Honor, I move that Exhibits 7 through 20 be
70 received in evidence. 13 is already in evidence. I move that Exhibits 7 through 20 be received in evidence for the purposes of this proceeding.

Mr. Marks: No objection.

The Court: They may be admitted.

(The exhibits marked Plaintiff's Exhibits 7 through 20 were received in evidence.)

By Mr. Farber:

Q. Now, Mr. LaRue, while you were actually engaged in the search of Mr. Katz' quarters did you have occasion to see Mr. Katz? A. Yes, I did. He came in while we were conducting the search.

Q. And was there any conversation with Mr. Katz? A. Yes. During the course of the search he asked me when he might obtain his records back.

Q. Did he specify what records? A. The ones that were referred to as No. 7, I believe.

Q. As Government's Exhibit 7? A. The 148 sheets legal size yellow tablet. And he asked me when he could have those back, and I told him that I did not know, that I had no authority over that. And he said that I must realize by taking his sheets, his records, I was putting him out of business.

In conversation he stated that that was the only
71 business he knew; that he couldn't make $60 a week doing anything else.

Q. What did he say he did? A. Handicapping and betting.

Mr. Marks: Well, I am sorry, your Honor, may I—I was a little bit lax. I'd like to move to strike these conversations again on the ground that there is no showing that at the time of the making of the statements the defendant was advised of his rights to remain silent and have an attorney.

Mr. Farber: He had already been previously warned. In addition I will ask Mr.—

The Court: This came at a time, I believe, subsequent to—

Mr. Farber: I had better establish that, your Honor.

Q. Was this subsequent to Mr. Katz' arrest? A. Yes, I was present at the time of the arrest. I assisted Doherty and Donovan in the arrest.

Q. Fine. Thank you. A. And present when statements were made by Special Agent Doherty.

Q. And with respect to the conversation that pertained to the records did you initiate that conversation with
72 Mr. Katz? A. No, I did not.

Q. Or did he initiate it with you? A. No. He asked me when could he get them back.

Mr. Farber: Thank you. I have no further questions of this witness.

Cross Examination

By Mr. Marks:

Q. Is that the sum and substance of the conversation had with Mr. Katz? A. No. We had other conversations.

Q. Did you make notes of that conversation? A. No, I did not.

Q. Everything you testified to now is strictly from your own memory? A. No. I recorded it that day on an interview form which we have. I recorded it.

Q. That's what I am asking you. Did you make a written notation of that conversation? A. After it was over, not—

Q. Yes. A. —during the conversation.

Q. Yes. Afterwards? A. That afternoon I did, yes.

Q. Do you have those written notations here? A. I don't have them with me. I think we have a copy some-
73 where.

Q. On those written notations are the conversations that you have stated here of Mr. Katz? A. In substance exactly what I said, yes.

Q. That he said, "This is my only business"? A. "You put me out of business. I have done this for 30 years." And I am not sure if he—if the comment about the sixty—making the $60 a week is in error. I wouldn't swear to it without looking at the notes.

Q. In other words, what he in essence stated was that he was a bettor? A. And a handicapper, yes.

Q. And a handicapper? A. Yes.

Q. Well, a handicapper means what? Someone who— A. One who selects the winner or selects a—places the odds and selected—

Q. That can be on horses or anything else? He didn't say he was a bookmaker? A. No.

Q. And you didn't believe he was a bookmaker? A. No. Now, what was that?

Q. You didn't believe he was a bookmaker? A. I made no conclusion on that, no. I didn't make any conclusion as to whether he was or was not.

74 Q. Well, prior to that you had executed the search warrant, you were aware of the investigation that was going on, weren't you? A. Yes.

Q. And hadn't you arrived at some conclusion as to whether or not Mr. Katz was a bettor or a bookmaker?

Mr. Farber: I will object. Mr. LaRue is not an expert and has not been qualified as such, your Honor.

The Court: Overruled.

Mr. Farber: Thank you, your Honor.

The Witness: To be honest with you, I hadn't concluded as to whether he was or was not a bookmaker. In my opinion I felt that he was either bookmaking or betting for someone else because I didn't think that he would bet to the extent that he was on his own.

Mr. Marks: All right.

Q. What other conversations happened in that apartment or occurred?

Mr. Farber: Objection, your Honor; beyond the scope of the direct examination and also—

Mr. Marks: Testing his recollection, your Honor.

Mr. Farber: —also irrelevant and immaterial.

The Court: The objection will be sustained unless you limit it to time. I think other conversations—

Mr. Marks: I am talking—

75 Q. How long was Mr. Katz in your presence while you were searching his apartment? A. About 30 minutes.

Q. And you were looking for the items specified on the search warrant; is that right? A. I was primarily making

out the list at this time. We had looked at everything and we were writing out the inventory at the time.

Q. Now, during this 30 minutes of conversation you had one series of conversation about returning his records? A. Yes.

Q. Wherein he talked about he would be out of business; is that right? A. Yes.

Q. Now, were there any other conversations on any other subject? A. Well, there was on this—primarily it was concerning him. The conversation was as to the FBI's interest in gambling. I commented that "We wouldn't be here if you would bet locally rather than interstate." And he says, "I can't bet locally."

And I said, "Why not?"

And he said, "Because the bookmakers in Los Angeles won't pay off."

And then I asked him—do you want more?

76 Q. That's another conversation you remembered? A. Right.

Q. Do you remember any conversation about money? A. Yes.

Q. Did he make some complaints that he had lost some money? A. When he came in the door I pointed out to him that Special Agent Rockwell who assisted in the search had found two $100 bills in his pocket, this pocket of a coat hanging in the closet. I said, "I have already made out a slip saying that this was found and recorded the numbers appearing on those two $100 bills. I am going to leave it with you." He immediately went to the coat, looked in it and says, "There was more." And I says, "There was not more. That was what we found." And there was—it wasn't pursued any further.

Q. That was the end of that conversation? A. Yes.

Q. By the way, you didn't take the two $100 bills, did you? A. No, sir.

Q. But you took two rolls of quarters? A. Right.

Q. Is there any particular reason why you would take one form of money and not another one? A. Yes.

77 Yes.

Mr. Marks: I don't think I would be silly enough to aks about that.

Mr. Farber: I will ask the question for you, Mr. Marks, though it be silly.

Why did you take the two rolls of quarters?

The Witness: Because he was using large numbers of quarters to make his calls to Boston and to Maimi, and I felt that they were an instrumentality of the crime.

Mr. Farber: All right. I have nothing further of Mr. LaRue, your Honor.

Mr. Marks: May I ask one further question?

Q. Bettors usually use money to bet, don't they? That's the usual form of exchange? A. Money, yes.

Q. And it was your opinion that money that was found in bills would not be instrumentalities of the crime? A. It could have—go ahead.

Q. But that quarters which were used in the phone would be because the phone was used to facilitate the transmission of the information; is that correct or incorrect?

Mr. Farber: Objection, your Honor; argumentative; also asking for a particular conclusion of this witness.

Mr. Marks: Well, that was the question—

The Court: Well, it is. I don't know whether we
78 are interested in—he hasn't been qualified as an expert in this field necessarily. Sustained.

Mr. Marks: Thank you. I have nothing further.

Mr. Farber: The Government calls as its last witness Mr. Barron.

79 JOHN ROBERT BARRON,

called as a witness by the plaintiff, having been first duly sworn, testified as follows:

The Clerk: State your name for the record.

The Witness: John Robert Barron.

Direct Examination

Mr. Farber: Mr. Marks, is it stipulated between us that for the purposes of this proceeding only Mr. Barron is qualified as an expert in the gambling and bookmaking—

Mr. Marks: That's pretty broad. I will stipulate that he is an expert in the ways and means of gambling and bookmaking in the County of Los Angeles.

Mr. Farber: Your Honor, I would like to accept that stipulation.

The Court: All right.

Mr. Farber: I don't know if he is an expert gambler or not, your Honor.

Q. Now, Mr. Barron, have you come to a conclusion—excuse me. Let me ask you this question. Have you had an opportunity to review the tapes which were the basis for Exhibits 1 through 6, transcript of conversation overheard in the phone booth? A. Yes, I have.

Q. And likewise, have you had an opportunity to review the records which were taken from Mr. Katz' resi-
80 dence? A. I have had occasion to look at them, yes, sir.

Q. Now, from your observation have you reached a conclusion as to the activity that Mr. Katz was carrying on with respect to gambling?

Mr. Marks: Well, just a minute. Are we talking about from the conversations or from the exhibits?

Mr. Farber: Well, I am going to ask—I am going to ask him for his conclusion and then I am going to ask him what he bases it on so you will be able to determine—

Mr. Marks: I think his conclusions are irrelevant and immaterial for this proceeding because what we are trying to find out is whether the exhibits are admissible. So the only question is from the original transcript of the conversations, and then we can discuss subject to a motion to strike whether even those conversations are admissible for the agent to form his conclusion.

Mr. Farber: Well, to carry defendant's argument to a logical conclusion, your Honor, I couldn't ask the question at all because I think he has also asked to suppress the conversations that were overheard from the phone booth. I am asking this question subject, of course, to a motion to strike if—

The Court: We can't very well suppress evidence unless we know something about it. I think to rule on some of
81 these motions now would be a bit premature and would be ruling on the motion.

Mr. Marks: All right.

The Court: The objection will be overruled, it being understood, of course, that the court is making no determination at all with respect to the propriety of this seizure.

Mr. Marks: Thank you, your Honor.

Mr. Farber: Thank you, your Honor.

The Witness: I want to see if I clearly understand the question. Is it that in the review of the tapes, the transcripts of the tapes, did I come to any conclusion when com-

pared with the records that were seized following the arrest and search?

By Mr. Farber:

Q. As to the occupation of Mr. Katz. A. Yes. Conclusion-wise from what we—from what I read on the basis of what he was—his conversations with Boston and Miami, and in particular with this conversation to Boston he made statements in the transcript—

Q. Excuse me. Will you tell me what your conclusion is first, and then I will ask you— A. I was of the conclusion that he was, one, wagering for himself and others, and, two, —I will restrict myself to the conversations—and, two, that on the basis of these conversations he was writing in the phone booth at the time of the call. I concluded from
82 these two things, the transcript and his writings, that he was keeping records of these bets for himself and for others.

Q. Now, is there a term in gambling parlance for a person who bets for others? A. A commission man, I think they call it. I am certain they call it a commission man.

Q. Now, would you take a look at Government's Exhibit 13, please, sir. A. Yes.

Q. What is Government's Exhibit 13? A. It is a section of a line sheet, sports sheet, marked Thursday, February 25th, on which there is pencil and ink writings.

Q. Can you determine what type of records they are or it is, I should say, since we are talking about only one? A. It lists basketball teams which were written in in longhand. And the line—the line being the amount of points allotted to the favorite—I mean, to the underdog, if it is a minus system or a plus system, the point spread of that game, plus circled notations, for example, plus 4 which would be circled and the 10. There are penciled notations at the bottom, 884, for example, 1733, which I believe is a telephone number in Boston.

On the back side is the notation Elly with 26.70,
83 and Bl with $3.00. Would you like my opinion on this record?

Q. Yes. A. On the back side the Elly and B1 would be called to Elliott Paul Price of Boston, Massachusetts, a bookmaker there. And B1 would refer to Blabs Romash

who is a Miami bookmaker, and the amount that he owed to each on the basis of bets made.

Q. Now— A. The front section would list—now, I cannot testify with accuracy as to the full notation made on the front side.

Q. Well, then, let's—I won't ask you the question.

Now, with respect to Government's Exhibit 7, do you have an opinion as to what Government's Exhibit 7 is? A. These are individual sheets for each major collegiate basketball team, listing the team in the upper left-hand corner, listing the players of that team. It goes from Alabama alphabetically all the way through, at least at first blush it would look like every major collegiate team, listing the players along the left-hand column. And along the top he would start a column for their opponents.

He then charted each individual player, his height, what year of college he was in and what the points that he had scored against the team that he had played in the top.

For example, if Andrews for Alabama scored 10
84 against Duquesne—and I know that—I can't read all these—

Mr. Marks: I think the exhibit speaks for itself.

Mr. Farber: I think so.

The Witness: Yes.

By Mr. Farber:

Q. I think that is correct. Rather than going through and reading the exhibit, what in total are these exhibits? How would you characterize them? A. I would characterize these as—incidentally, I would like to qualify that one statement. He has a total figure that he puts at the top which is a circled figure, numerical figure. These are handicap records for each team. He gives them a designation. A numerical designation when compared with the numerical designation on another team, he would come out with who was favored should they play on a neutral court.

Q. Thank you. Excuse me just a moment.

Mr. Farber: Your Honor, in the interest of saving the court's time, the Government and the defense will stipulate that Mr. Barron will testify if asked the following questions, and it is deemed for the purpose of this stipulation that the questions have been asked—

Mr. Marks: Right.

Mr. Farber: —that he will characterize each and
85 every exhibit in the manner that it is entitled in the exhibit register. Is that a clear statement for a stipulation, your Honor?

The Court: Yes.

Mr. Marks: So stipulated.

The Court: May I see the records?

Mr. Marks: For the purpose of this hearing.

Mr. Farber: For the purpose of this hearing.

The Court: Have you got a copy here?

Mr. Farber: Yes, your Honor. I believe I provided the clerk with a court's copy.

I have no further questions of the witness, your Honor.

Cross Examination

By Mr. Marks:

Q. Mr. Barron, let's start at the beginning. From the telephone conversations that were recorded you formed an opinion, did you not, that Mr. Katz was placing bets? A. Yes, sir.

Q. Didn't form any opinion that he was bookmaking in those conversations, receiving wagers and paying out moneys to persons from the odds on their wagers? A. Mr. Marks, I concluded that Katz from a look at the records was betting for himself, betting for someone else.

Q. Let's talk about the transcripts of the tele-
86 phone conversations you heard. A. That's what I am talking about.

Q. Those alone you reached a conclusion that he was betting for somebody else? A. Yes, sir.

Q. From his telephone conversations? A. Yes, sir.

Q. Now, when you say betting for somebody else does that mean that he was receiving—were you able to conclude that he was receiving a commission from that or that merely there may have been somebody who was joining in with him in the placing of a bet? A. May I—in answer to your question, I could not make that determination.

Q. All right. So the word "commission man" is not an accurate description of what you could determine from

those—at least those transcriptions of the telephone conversations, because a commission man get a commission for placing a bet if the winner wins; isn't that correct? A. Are you asking that question, sir?

Q. Yes. A. No.

Q. What is a commission man? A. A commission man works varying ways. It used to be referred to that
87 they would receive a commission for moving money. A commission man is an individual who will—who has what they term outs who can move money and who will move the money. All he gets for gratuity is that someone will type into him what they call steam teams which he will then bet on with the favorite. In other words, he does this in order to receive the information.

Q. Mr. Katz is a handicapper, isn't he? A. Yes, sir.

Q. He is the one who makes his own determination as to what team should be—what kind of bets he should make? A. In Mr. Katz' case?

Q. Yes. A. I have nothing that would go against that.

Q. Well, his records show 30 years of teams that he has recorded himself, don't they? A. Yes, sir. I don't know if it is 30 years. These records reflect specific years that these teams were plotted. It certainly doesn't go back 30.

Q. But it goes back several years? A. Yes, sir.

Q. Now, these yellow sheets which are Exhibit 7 are equivalent to your forms in the race track, aren't they? You go to the race track and you get a racing form, it shows how many races the horse has run before, how many times it has run, what it run against other horses in
88 the race; isn't that right? A. Well, I have seen the printed forms. I have not—these are handicap records. If those are handicap records then they are alike in that this deals with sports.

Q. Right. All this does is list in Mr. Katz' handwriting teams, the players on the teams and how the teams performed against one another over a period of years; isn't that correct? A. That's correct.

Q. And what players were on the teams and how the players performed? A. That is correct.

Q. And from that Mr. Katz, in your opinion, put a number on this in which he rated a team? A. That is correct.

Q. And it is a numerical record, and that's all it is, right? A. I don't know if that's all it is. It is certainly that.

Q. Now, getting back to our other question about the telephone conversations, the tape recordings, the only conclusion you could arrive at in fact is that Mr. Katz was betting. Whether or not he was a commission man in the way you have described is something you couldn't really determine from those conversations; is that correct?

89 A. I knew—I definitely knew he was betting for himself and for someone else.

Q. All right. A. Yes, sir.

Q. But you didn't know whether he was betting for someone else in terms of receiving remuneration for it or whether he was just adding somebody's bet to his to place it; is that correct? A. Not on the tapes, no, sir.

Q. So then you couldn't classify him in your own mind as a commission man at that point; right? A. From a review of the tapes, no, sir.

Q. And from a review of the tapes you couldn't classify him as a bookmaker, could you? A. I couldn't classify him as a commission man, but I couldn't delete him as one.

Q. All right. How about a bookmaker, could you delete him as a bookmaker from the tapes? A. Technically, yes, sir.

Q. All right. A. I'd like to correct my statement. Any time in our mind an individual bets for someone else, he is moving money which technically is moving for someone else, he can technically be termed a bookmaker.

Q. Well, a bookmaker is defined, isn't it, in the

90 Code as one who is in the business of receiving wagers? A. Yes, sir.

Q. Now, did you believe at that time that Mr. Katz was in the business of receiving wagers? A. He received a wager which he moved for somebody else, yes, sir.

Q. At the time that you saw those tape transcriptions did you believe that Mr. Katz was in the business of receiving wagers? A. I could not make a determination.

Q. All right. When you saw the exhibits after the search did you believe that he was in the business of receiving wagers? A. I can't make a statement on that fact. I did not review them with that in mind.

Q. Did you help conduct the search, by the way? A. No, sir.

Q. Now, many of these exhibits that were seized are matters that came out of newspapers and magazines; is that correct?

Mr. Farber: May we be specific on that question, counsel?

Mr. Marks: All right.

Q. Exhibit 9, pro football handicap sheet, was that from a newspaper or was that on the written sheet?

91 A. These were on written yellows dealing with football.

Q. Sports sheet, Exhibit 10, wasn't that from a newspaper?

Mr. Farber: I think the—

The Witness: I'd have to look at the exhibit, sir. I don't know.

Mr. Marks: Yes.

Q. Look at that. A. That is a sports sheet put out locally for the purpose of entering your line and teams.

Q. Now, you have seen all the exhibits so far, haven't you? You have gone over them? A. I have reviewed them but not the way you are asking the questions. We have an expert—

Q. Well, aren't they matters taken from newspapers and magazines regularly printed every day, handicap sheets? A. We picked up some magazines. I don't know, the notations he made on here, where they came from.

Mr. Marks: I believe that's all.

Redirect Examination

By Mr. Farber:

Q. Mr. Barron, you have said in your opinion that Mr. Katz was a commission man. You say you can't make that determination solely from the transcript. Is that

opinion also based on a review of the records?
92 A. I believe, sir, that the—I would be testing—testifying in that regard in hearsay evidence from the standpoint of information told to me by our expert.

I, in looking at the tapes, and from, I mean, the transcripts of the tapes and comparing his statements and his notations reflecting amounts of money owed, what appeared to be owed to him, it was my conclusion he was betting for himself and for other individuals based on information that he provided and provided by them.

Therefore, under my definition he would be referred to as a commission man, yes.

Q. Well, would you take a look—

Offers in Evidence

Mr. Farber: Your Honor, I don't believe I moved, and I think I should at this time, move that Government's Exhibits 1 through 6 be received in evidence for the purpose of this proceeding.

Mr. Marks: No objection for the purposes of this proceeding.

The Court: They will be received.

(The exhibits marked Plaintiff's Exhibits 1 through 6 were received in evidence.)

Mr. Marks: Except the general objection that they were obtained illegally.

The Court: Yes.

93 By Mr. Farber:

Q. Would you look at Government's Exhibit 1? A. Yes, sir.

Q. Now, Government's Exhibit 1 refers to a conversation on February 19, 1965 does it not? A. Yes, sir.

Q. Now, in the body of that conversation does that conversation itself indicate whether or not Mr. Katz is engaged in betting with others? A. Betting with others?

Q. Or for others? A. Yes, sir; both. On both instances it would be true.

Q. Does it— A. He—

Q. Does it indicate how he is getting his recompense? A. In this exhibit?

Q. Yes. I'd like you to read the section that does apply so that we are getting the exact words before the court. A. May I explain the—the text of this in order not to read it in its entirety?

Q. Yes. A. A phone call was made on February 19th to Boston, Massachusetts, in which Mr. Katz had a conversation telephonically with someone in Massa-
94 chusetts. He stated there was, in general terms, a disagreement with the individual being called over an amount of money that he wanted to straighten out with him. And he—he was sort of angry therein.

He said, "I could have saved the eight dollars. What are you going to do with it?" And apparently he was then told that he would receive a call, which he did receive. It was made from someone out of—in that area to him at his phone in Los Angeles.

And in conversation with this individual he discussed this dispute. Apparently the dispute centered around the fact that he was giving a wrong line.

He then went on to explain that this is not—"This isn't my business. It isn't my play. I take a piece at a dollar or two."

Q. You use the term "eight dollars" and "one dollar." Do you know from your experience of investigating and making cases, does one dollar mean literally one dollar?

Mr. Marks: Well, I will object to that as beyond the scope of the expertise, your Honor. Whether one dollar means a dollar or doesn't mean a dollar, I don't think any expert can testify to that.

Mr. Farber: Your Honor, as an offer of proof I respectfully submit that there is a certain system in which—

The Court: Objection will be overruled.

95 Mr. Farber: Thank you.

Q. Have you ever heard of a nickel system? A. Yes. A nickel in placing a bet would refer to five hundred dollars. Eight dollars would be eight hundred dollars.

Q. When you said a nickel would refer to five hundred dollars, did you misspeak yourself? You said five hundred. Did you mean fifty? A. No. A nickel would be five hundred dollars on a bet.

Q. All right. A. And a dime would be a thousand dollars. When you are speaking of in between it would

be seven dollars would be seven hundred, eight dollars would be eight hundred.

Q. All right. Thank you. Now, would you continue with the conversation which you are reading? A. I was referring to a conversation in which he was called in Los Angeles—his call to Boston in which he explained to the calling party that it wasn't his business, this was the claim that he was making with this book. "I take a piece at a dollar or two—the fellow I am playing he is behind." And then he goes on to state that he—of the amount owed, eight hundred and some is owed to another individual.

Then the conversation continues. Then he said,
96 "What are we going to do? I think it is the fairest thing. I am going to pay the guy—so help me."

If you took this thing in sequence, he was trying to get credit for the amount that the book claimed in Boston that he owed. He was explaining to the calling party that all of the money owed was not his, that some of it belonged to another individual, and that if credit is given to him he will pass it along to the individual who he is playing for.

Q. Now let me ask you another question, Mr. Barron. When the recorder picked up conversation—we have used the term conversation. Did you pick up both ends of the telephone conversation or just Mr. Katz' words? A. At no time did we pick up the other party's conversation.

Mr. Farber: Thank you. I have nothing further, your Honor.

Mr. Marks: Nothing further.

The Court: You may step down.

Government Rests

Mr. Farber: The Government rests, your Honor.

Mr. Marks: Would you like to hear argument of counsel now?

The Court: You have no further evidence at this time?

Mr. Marks: No.

97 The Court: Before we listen to any arguments I think we will take this other matter.

(Other matter heard.)

The Court: Now, gentlemen, do you want to proceed with the motion?

Mr. Farber: Your Honor, prior to proceeding I had one thing called to my attention. It is purely an administrative matter. The Federal Bureau of Investigation has asked the court's indulgence. I understand from the agents that they are somewhat disturbed whenever there is an allegation of impropriety on the part of an agent such as an allegation that certain money was taken. They are under an obligation to refute that statement at the time that it is made if possible.

Mr. LaRue would like to state under oath that no money was taken, if he may do so at this time, to comply with the Bureau regulations.

Mr. Marks: Your Honor, before this is taken any further, the only question that I asked Mr. LaRue was whether or not he recalled any other conversations about money. There was no allegation of improperiety made.

The Court: Well, he took the 25 cents.

Mr. Marks: That's listed on the inventory.

Mr. Farber: I think there is an implication which the agents for their own records—it is not germane to
98 this case, and that's the reason I asked the court's indulgence. It is not germane to the case, but for the agent's own—

The Court: Very well.

Mr. Marks: I am glad to indulge the agent. I just wanted the record to be perfectly clear that the questions did not allege any impropriety nor at this time do we allege any impropriety.

Mr. LaRue: I just want to clear the inference there. I think that will take care of it.

The Court: That will clear the inference?

Mr. LaRue: If the record shows he is not making any allegation of—

The Court: Impropriety?

Mr. LaRue: —impropriety or anything taken other than what was on the inventory sheet.

Mr. Marks: Yes. My questions, again, did not mean to infer an impropriety or an allegation of taking. It was a question relating to conversations had about money.

Mr. LaRue: Well, the conversation was an allegation that there was more money than what I said was there.

Mr. Marks: All right.

Mr. LaRue: If you are withdrawing the inference that there was more there than—or denying that there was more there, fine. Otherwise I am stating under oath that there was no more than what I stated, and nothing more
99 was taken than what was on the inventory sheet.

Mr. Marks: I will accept the statement of the agent so made under oath.

Mr. Farber: I think he has previously been sworn.

Thank you, your Honor.

Argument on Behalf of Defendant by Mr. Marks

Mr. Marks: If the court please, the motion here is a little bit involved in that it concerns two or three different aspects of the laws of search and seizure.

The first and primary portion of the motion that we have to get to which, if granted by the court, would dispose or be dispositive of all else, I believe, is, to wit, the conversations overheard by means of recording devices through the telephone company. Because without them —and through the telephone booth—without them I think the court can recognize that the affidavit of probable cause, the affidavit in the search warrant would have no probable cause to show any violation absent the content of the conversations had, because what they would have is the following state of affairs: Information of some nature that Mr. Katz associated with a bookmaker who was from New York; No. 2, Mr. Katz made phone calls; No. 3, that the phone calls were to Boston, Massachusetts, to a person who the agents know as associated with known bookmakers.

I believe that is the content of the affidavit. If I am mistaken, fine. But that, as far as I can under-
100 stand, is what is involved here.

Now what they have is, absent the conversations of Mr. Katz, information of an association based upon telephone calls to persons who are again associated. Nothing to establish that any crime has been committed, bookmaking, wagering or any other offense.

So now in order to sustain probable cause, if they have probable cause, is to overhear by electronic means a private conversation. The question before the court is whether or not this type of invasion of the privacy and invasion of a private conversation is in violation of the Fourth Amendment.

I suggest to the court—I am not going to reargue what I stated in my points and authorities for I think they are perfectly clear. I think that Olmstead is a dead letter. It hasn't been specifically overruled, but either by this case or some other case it is going to be in the very near future.

I base that primarily upon, I think, the Hurst case which is out of the Ninth Circuit. It is quite in point. That is that the right to privacy, a violation of the right to privacy is a violation of the right guaranteed by the Fourth Amendment. The right to privacy doesn't just extend to a person's home, it extends to his office, and I believe it extends to any place in which there is intended to be privacy.

101 I can point to the court the cases which are cited in Hurst. I think it is either Belickey or Britt v. Superior Court which came out of the State court. These were cases where the police officers peered into men's rooms enclosures, private enclosures through peepholes that they had into a private receptacle with a door. The California Supreme Court in these cases said no matter how transient the nature of staying in a private toilet is, nevertheless once a person is there he is entitled to privacy and he is entitled to be free of unwarranted and unlawful intrusions by agents.

I believe it means whether by their peeking in through a peephole or whether they take a device which is in fact a physical violation of the privacy. Because what it is doing is taking the sound waves which are a physical manifestation which otherwise would not travel outside the phone booth, magnifying them, amplifying them, and then recording them in a place where quite obviously the person intends to be private and not overheard.

The fact that the telephone company gives them permission to attach the sound, the recorders to the side of

the telephone booth is of no moment. The permission, I think this is quite clear, has to come from the person whose conversations are being recorded.

So, if that's—that is ruled in favor of the ap-
102 plicant, then everything else must go by the board.

I believe that the conversations were the probable cause upon which they could obtain a search warrant.

Now, going to the search warrant, we have a second question which I think is much more important and that is: What did the search warrant authorize them to obtain? Now, I submit, your Honor, that what they had was evidence that Mr. Katz was betting, and that they had evidence that Mr. Katz was betting, assuming it is admissible, across state lines by the use of a telephone.

Now, the search warrant reads that they are looking for bookmaking records, wagering paraphernalia, including but not limited to, bet slips, betting markers, run down sheets, schedule sheets indicating the lines, adding machines, money, telephones, telephone address listings, which are designed and intended for use as the means of committing criminal offenses in violation of Title 18, United States Code Section 1084, which is what we are here on.

And violations of Sections 4411, 4412 and Section 7203 of the Internal Revenue Code.

Now, what they were doing, your Honor, I submit to you, is instituting a search for evidence pursuant to the search warrant to establish the crime of bookmaking, which they were not permitted to do because what—they had all the evidence they needed. The further search was
103 an exploratory search, and it was a search for evidence. They sort of run into one another, the Fourth and Fifth Amendments. They cannot be distinguished.

Here the officer, I believe it was Officer Barron who wrote out the search warrant, admitted that from the information he had that's all he could determine was that the man was betting. Now they are searching for means or for matters which are designed and intended for use as means of committing other criminal offenses, bookmaking, violations of the IRS, Internal Revenue Code. This is an evidentiary search and evidentiary searches

are condemned, they are unlawful. The warrant cannot stand on that.

Furthermore, it is an exploratory search. It goes beyond the search. In fact, it went beyond what the search warrant allowed them to take.

They went through the entire records. They took magazines, they took money, which in the abstract I assume you can say is a way in which you place a bet. In other words, you can't do it without money unless you have some sort of credit card arrangement with a bookmaker.

But nevertheless money in and of itself is not criminal. And it can't be taken, I don't believe, pursuant to a search warrant.

The only thing that you can do is state that there was a certain amount of money. But to enable an agent
104 to take money from a person because he is a bettor, it goes beyond the scope of a permissible search.

Exploratory in that sense means by taking completely innocent matter such as newspaper articles and clippings. I believe it was an exploratory search.

And we get down to the final question, I guess, that Mr. Farber has argued, and it is a very interesting question but I don't think it applies here, assuming that you have a valid search warrant and assuming that they only took—they were not searching for evidence but they were searching for instrumentalities of the crime, the question is, what are the instrumentalities of the crime of being in the business of betting and use the telephone. I submit that the only instrumentalities of the crime would be the telephone because it is not a crime to be in the business of betting. The crime is that if a person is in the business of betting and uses the telephone and transmits the messages, the betting information, then he is guilty of this crime denounced by 1084.

I don't believe that you can by saying, using a word "instrumentality," transforms a search for evidence that he is in the business and say (a) we found the evidence that he is in the business, now we will call it an instrumentality. Because that is not what an instrumentality of the crime is. The man had some of these records for
105 years and years and years. I think it is quite well established. They aren't the instrumentality of placing

a telephone bet, transmitting information. They aren't the instrumentality of any crime. They are merely evidence to show that if he did place the bet or did transmit wagering that he was in the business of doing it.

Therefore, I say that the search warrant was too broad, too general. It was a search for evidence, not for the instrumentalities or means. They are certainly not contraband. None of the items that were taken were contraband.

They are certainly not the fruits of the crime. So what you are talking about is if it was a search for evidence it is invalid. If they picked up true—if they picked up matters which are outside the search warrant—and it is too general, it is exploratory, it allows the agent his total discretion as to what to pick up—it must be suppressed.

I believe that under any of these tests the items seized, the conversations had over the phone, I would perhaps go so far as to insist that—well, I was thinking about Mr. Frei and his ears to the electrical outlet.

The Court: I didn't work, though.

Mr. Marks: Pardon me?

The Court: It didn't work very well.

106 Mr. Marks: He didn't get any shocking conversations, in any case. I just don't believe that if you read thes ecases about the astounding advances of electronic equipment that the Supreme Court or this court can allow it to be said that now if you can stand away from a person's home and beam into the very innermost recesses of his home and pick up incriminating conversations that he has had that it is perfectly all right as long as they don't dig into the wall. I think that it gets to be a horrifying situation.

I think the justices of the Supreme Court have discussed that and with quite some trepidation as to how far they are going to let invasions into the home go through the use of electronic equipment which—science is wonderful but how far can we let it go?

Thank you.

Argument on Behalf of Plaintiff by Mr. Farber

Mr. Farber: Your Honor, this defendant, of course, is charged with violation of Title 18, USC, Section 1084, in that anybody who is engaged in the business of betting or wagering and places interstate telephone calls in the carrying out of that activity, if such activity can be proven, is guilty of that charge.

Now, we agree with defense counsel that if the telephone conversations and the records are suppressed—or if the telephone conversations were suppressed that the search warrant must fall and the items seized would not
107 properly be before this court.

But it is our position that those telephone conversations were taken properly, were overheard properly; that there was no violation of the Fourth Amendment.

I had the feeling while I was listening to defense counsel that he was speculating as to what the law might or might not be some time in the future. Of course, it is very interesting to discuss what the law might or might not be in the future. But as an attorney representing the Government—and I respectfully submit this court as a District Court is bound by the law as it presently stands —is fairly clear.

Goldman v. United States, which is the landmark case, a Supreme Court case decided in 1942, 316 U.S. 129, has been cited again and again for the proposition that provided there is no electronic device that has been planted by an unlawful physical invasion of a constitutionally protected area, then there is no violation of the Fourth Amendment.

In Goldman the facts were these, your Honor. Special agents of the Federal Bureau of Investigation had information that certain violations pertaining to the bankruptcy laws were taking place. They had an informant who was working with the investigators.

A meeting was set up in the office of the defendant.
108 The special agents of the Federal Bureau of Investigation took the room right next door to the office of the defendant, and just, as in this case, they planted a microphone against the wall of the office belonging to the defendant without penetrating into the wall in any

manner whatsoever. By use of this device they picked up the conversations that were emanating from the office that belonged to the defendant.

Of course, in that case the conviction of the defendant was attacked in the Supreme Court. But the Supreme Court upheld the conviction on the ground that there had been no trespass on to property belonging to the defendant and that there had been no physical intrusion.

Basically, the decision in Goldman was bottomed on the very famous case of Olmstead v. United States.

Now, defense counsel says that Olmstead v. United States is a dead letter and it has no vitality. But I don't think that the majority of the Supreme Court agrees with him.

For instance, in Lopez v. United States the majority opinion was written, and these words were said at pages 438, 439 of 373 U.S. This is a 1963 case, your Honor.

"The court has in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been be-
109 yond the reach of the human ear. See, e.g., Olmstead v. United States, Goldman v. United States."

Citing the two cases we have just discussed.

The court continues:

"It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area."

Then in contrast the court mentions Silverman v. United States. Silverman v. United States, I think that's quite a famous case. That is the case where a spike mike was actually driven through the wall into the defendant's house. The spike touched a heating conduit and in effect turned the whole house into one large woofer and tweeter. Conversations throughout the whole house were picked up by the agents.

The conviction in that case was reversed on the ground that the spike mike going into the wall and touching the heating conduit was indeed a physical intrusion into the property of the defendant.

So we respectfully submit that the first ground for upholding the activity that was carried out in this case is the rationale of Goldman v. United States; that the procedure used by the agents went no further than that in Goldman.

With respect to Goldman, this Ninth Circuit in
110 People v. Benson, 336 F. 2d 791, Ninth Circuit, 1964,
in synthesizing the electronic eavesdropping problem again cited Goldman as the law of the land.

Now, of course, there is a second and separate ground upon which we can uphold the procedure that was followed with respect to the telephone booth and that is on the ground that in any event a telephone booth is not comparable to a home or an office; that there are or may be certain constitutionally protected areas but the whole world at large is not a constitutionally protected area.

There are degrees. When you drive a spike mike into a wall and overhear conversation in a home you are running the risk that you are going to be prying into the most intimate secrets of a family. This risk, of course, is lessened to a great deal not only quantitatively but, I think we can say, qualitatively when you are dealing with a phone booth as opposed to the house or home.

A man when he uses a phone booth runs the risk right to start with that the words he uses will filter through the thin walls and door of that phone booth and be picked up by people who are passing by, who are standing outside of the phone booth.

Now, in United States v. Borgese which is a Federal Supp. case, your Honor—it is 235 F. Supp. 286, Southern
District of New York, 1964—of course this case
111 would not be binding on this court but it is good
persuasive authority.

In that case the facts are strikingly similar in that an investigation was commenced and it involved the defendant's use of a phone booth.

There is one difference in that in Borgese the agents went much further than they did in this case in that they planted a microphone underneath the table inside of a phone booth and actually penetrated into the interior. But the District Court refused to suppress the conversation

overheard in that manner on the ground that a telephone booth is not a constitutionally protected area, and the area in which privacy is guaranteed is essentially the houses and the homes of people. And the houses extended as far as their offices.

But the court specifically declined to go further and make a telephone booth a constitutionally protected area.

Now, with respect to the search warrant, your Honor, we respectfully submit that it is true that much of the documents that were picked up by the agents in this case were indeed evidence. But that does not necessarily mean they should be suppressed, because they have a second characterization and that is not only are they evidence but they are instrumentalities of the crime.

Now, Mr. Marks has stated that the crime is the use of the telephone for placing wagers in interstate
112 commerce by one who is engaged in the business of betting so, therefore, the only thing that should be suppressed is the telephone. Now I think that is somewhat of an oversimplification of the problem because, after all, merely using the telephone alone is not criminal, it is the whole activity conjoined.

And for the activity to be criminal not only must the telephone be used but a man must be in the business of betting.

Now, in this case the records that have been seized are vital to the defendant's occupation as a bettor. He himself has admitted that. He admitted that to three FBI agents.

Without those records this man could not engage in the business of betting which, of course, is one of the elements of this crime. And if he were not a bettor, he could not be—and if he could not engage in the business of betting he could not use that telephone to place interstate calls.

Now, in Marron v. United States, your Honor, a Supreme Court case, 275 U.S. 192, certain records were seized from a bootlegging operation. Of course, the same—essentially the same objection was made in that case as was made here that the records themselves were not instru-

mentalities of the crime, but the court had this to
113 say, and listen to the type of records that were taken.

The court said:

"The bills for gas, electric light, water and telephone services disclosed items of expense; they were convenient, if not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest."

Likewise, in this Circuit, in Leahy v. United States, Internal Revenue agents were interested in suppressing a bookmaking operation, and the court at that time said:

"It is clear from the items seized that the search was specifically directed to the instrumentalities used in the commission of the crime of unlawfully engaging in the business of wagering. The records of an illicit business are instrumentalities of crime."

And then the Ninth Circuit cites Marron, the case we just discussed.

And then in parentheses:

"(officers incident to arrest may lawfully seize account books and papers used in carrying on the criminal
114 enterprise.) Such were the records obtained in this case."

Now, your Honor, in the case at bar the records seized were handicap records. They were the records which enabled this defendant to carry on his occupation, that of a bettor, the only occupation that he says he knows. For that reason we do respectfully submit that they are instrumentalities of a crime.

Mr. Marks: Very briefly, your Honor.

I appreciate the Government's candor in its memorandum of points and authorities indicating the Ninth Circuit cases which I believe are controlling here with relation to whether or not these are instrumentalities and whether the search was a little bit too broad. However, the Gov-

ernment's statement of the effects of the Olmstead, Silverman and the Lopez cases, I think, stretches the case a little bit.

Now, the Government cites the Lopez case. If the court will remember, Olmstead was the attaching of the microphone outside of the house, hearing the conversations. In 1942 they said, "Okay." Now along came Goldman Goldman turned the house into a—if my memory is correct, because perhaps it was Silverman—do you remember?

Mr. Farber: Pardon me?

Mr. Marks: Which one was it where it turned the house into a loudspeaker?

115 Mr. Farber: That's Silverman.

Mr. Marks: Goldman cited Olmstead and went no further. There was a large dissent in Goldman.

Silverman now says that we won't have to decide the question which has been raised here about the unlawful invasion of privacy in overruling Olmstead because irrespective of what Olmstead has said here was a physical invasion of the property. So we don't even have to talk about Olmstead.

This was a clear violation of the Fourth Amendment. So right now they are eroding away Olmstead. We are not going to reserve it, they are saying, because this is not before us. This is how the Supreme Court works. Perhaps it is wrong, but that's the way they do it.

They talk about the question they have got at hand.

Now we get to Lopez. The question raised by counsel in the citation is incomplete because it goes on. It is very interesting. The court—and this is at page 438—

"The court has in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear."

They cite Olmstead and Goldman.

"It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a
116 constitutionally protected area." Silverman v. United States, supra.

The validity of these decisions is not in question here. Again they are sidestepping the decision, because in Lopez what happened was—I will read on. Indeed this case involves no eavesdropping whatever in any proper sense of that term. The government did not use an electronic device to listen in on conversation it could not otherwise have heard.

Instead the device was used only to obtain the most reliable evidence possible of a conversation which the government agent participated in.

So what the Supreme Court is saying, they are saying in Lopez that whatever the vitality again of the old cases where they sustained electronic eavesdropping, in Lopez the agent was invited in, he walked in, he had a conversation, he had a transmitter on him. They said in Lopez that all he was testifying to was what he overheard and what he was lawfully entitled to overhear. Just because he happens to make an electronic transcription of it which is more reliable than his recollection, we are not going to refuse that.

But they do state that they—the question of eavesdropping is the crucial question, and the crucial point is, did the government pick up a conversation by use of electronic eavesdropping which they would not otherwise be entitled to hear and which they were not invited in to hear.

117

The question is the sense of privacy. I believe as I say, your Honor, the only way I can read the cases is that even though they—the Supreme Court declined to rule on Goldman does not—and they say we won't go beyond it a fraction of an inch does not mean that the—that any court and any attorney just reading the cases knows what the law is today.

The law is today as far as I can determine that an individual has a right to privacy. And you determine the right to privacy with respect to electronic eavesdropping as to when the government agent has the right to—is attempting to overhear something which by electronic device he could not otherwise have had the ability or the right to listen in on or at least in some way utilizing this

increased power of hearing to get into private areas where he shouldn't be.

I don't know about this New York case. As far as I am concerned it is totally and 100 per cent wrong. But at least, as I say, this is the best I can tell you about the Supreme Court case.

Again, because the items are primarily evidence and, secondarily, they are instrumentalities, I think begs the question. The question is was there a search for evidence and are they in fact evidence?

118 Instrumentalities of a crime, as far as I am concerned are—have a very peculiar and straightforward definition. It may vary, but they are the items which have to be used necessarily to perpetrate the particular crime which is involved.

In the Harris case which is cited. I believe, the government agents were searching for checks and they came across a draft card. The search was sustained only on the basis that the draft card itself was contraband and it was part of the search. They came across it lawfully. They were under a duty to take the contraband. So that it relates back to the original search.

I thank the Government, they admit it's evidence. That's what they were searching for, they were searching for evidence of bookmaking when they didn't have the remotest probable cause to believe there was. The search warrant reads like a bookmaking search warrant where they are trying to find a violation of the Internal Revenue Code which is not involved here.

Here the simple proposition is, your Honor, you have a person who bets. If he uses the phone and bets and goes across country no crime, no crime. The only time it is a crime is his business is betting. And unless the agent can come across a different method then by a search warrant to go into the private papers to find evidence of

119 what the man's business is they don't have a right to search for that evidence.

It is not the crime of being in the business of betting, it is the crime of using the telephone if you are in the business. I think there was a search for evidence, and I think this should be all suppressed. I would ask the

court that at least if the court denies the motion, to inform the Government that the defendant has a right to make copies of his records, because assuming they are instrumentalities of the crime which I—arguendo, it is like a screw driver in a burglary, it is an innocuous weapon in itself, and it certainly is admissible into evidence to prove the crime of burglary. But once the case is over isn't the defendant entitled to have his screw driver back? It isn't contraband, it isn't to be forfeited.

In the same manner here, the defendant has the records assuming—I mean, the Government has the records. Isn't the defendant entitled to have copies of his own work product which are taken away from him? This is not a forfeiture case.

Mr. Farber: Pardon me, your Honor. That last point was not—I didn't have the opportunity to discuss that with the court.

Our position is this, your Honor, that the records themselves would be analogous to contraband in that not only were they used as instrumentalities for the per-
120 petration of this crime, but also in the State of California betting as such is criminal. A bettor who bets other than at the track commits a crime. For that reason we would not want these returned to the defendant because we would not want him to continue in the business of betting as such. For that reason we feel that they should not be returned to him in any event.

The Court: The matter will stand submitted and we will continue the disposition of it until a week from today at about this time.

Mr. Farber: Thank you, your Honor.

The Court: 2:00 o'clock next week.

Mr. Marks: The case that I called up on—or continued the matter for a week to this time, so I wonder if we could find some other date for it?

The Court: Well, it will only take a minute or so. I can have it at 9:30 or 1:30 any day next week you wish.

Mr. Marks: You say any day?

The Court: Would the 13th be all right?

Mr. Marks: Yes.

The Court: That will be all right. 9:30.
Mr. Marks: 1:30 or 9:30?
The Court: Let's make it 1:30. 1:30 on the 13th.
Mr. Marks: Thank you very much, your Honor.

(Whereupon an adjournment was taken at 4:00 o'clock p.m.)

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123 **Transcript of Hearing on Motion to Suppress Evidence**

LOS ANGELES, CALIFORNIA, TUESDAY, APRIL 13, 1965, 1:45 P.M.

The Clerk: Case No. 34715, U.S.A. v. Charles Katz, hearing court's ruling on defendant's motion to suppress evidence.
Mr. Marks: The defendant is ready.
Mr. Farber: Ready for the Government, your Honor.

Comments by the Court on Said Motion

The Court: Well, gentlemen, this motion to suppress the evidence, particularly the telephone conversations, raises a very interesting and exciting constitutional question, there is no doubt about that. It certainly presents a situation which is right in the field of law which is rapidly changing and which is in such a state of confusion at the present time.

It is pretty difficult for a court to know what the Supreme Court is going to do next. If I were to write an opinion as I first though I would do in this matter it would have to, of necessity, be lengthy and have to be an analysis of many decisions, many of which are Supreme Court decisions and many United States District and Circuit Court decisions which are certainly in hopeless confusion.

It would be a time-consuming task, and I doubt that it would help anybody but it would only add to the general confusion which already exists.

124 It seems to me that we have the pronouncement in the Goldman case which indicates that if the court were of the same disposition—well, it is controlling

in this case so far as the facts are concerned, shall we say. The facts, I think, are about as close to the facts which we have here as we can get.

If the court were of the same disposition it was at the time it decided that case and were to consider this case, I think there would be no question but what the motion to suppress would be denied.

The trouble, of course, exists in that Mr. Justice Douglas has repudiated his decision in the Goldman case, and the Silverman case throws great doubt upon the basis which the court used in the Goldman case.

So just what the court would do if it had the Goldman situation presented to it again is doubtful. It is very probable that there would be a different result. I mean it is almost a pretty safe conclusion that it would be a different result. Whether it would be the basis upon which such a result would be obtained, of course, we can only speculate.

It seems to me that since the District Court is a trial court and it is our duty to follow the law as it is handed down to us, we must start with the Goldman case and say this is the pronouncement of the Supreme Court as it relates to this particular set of facts, and for
125 lack of a new and different pronouncement we are bound by it. And until the Supreme Court decides to abandon this line of thinking and set forth with more clarity what they mean in this field, this court ought to adhere to that ruling.

Well, there are a lot of things that could be said. I don't know if it will help anybody any more than to merely say that the motion to suppress the telephone conversation will be denied.

Now, the motion to suppress and return the items taken at the time of the arrest, in the first place we have a search warrant which has some general language, it also has some specific language.

Insofar as its specific language is concerned it is sufficiently clear and specific, and one reading it can ascertain what is meant by it. The articles can be identified if found. There are some articles in the list which I think come definitely within the warrant.

The police officers also are entitled to the scope which they would have upon a search incident to an arrest, which would be a broader scope. They have found and perhaps taken other articles within that power.

So I think that the search warrant is adequate as to some things and that the scope of the search insofar as it is made incident to the arrest is adequate as to some articles taken, bearing in mind that there is a limitation.

126

As I understand the cases such as search must be limited to the instrumentalities of the crime and may not extend to matters which are purely matters of evidence.

In looking over the list of exhibits it seemed to me rather clear that most of the exhibits are exhibits which are in fact instrumentalities of the crime. They are the actual tools by which the defendant has engaged in the business of wagering, and which in this instance, having engaged in interstate transmission of bets, has committed the offense.

So going down the list of those items, I would think that items under 1, sub 1, 148 yellow legal-size sheets of lined paper—each bears names of colleges and surnames with numbers beside them in their column. Well, in fact everything down to—

Mr. Farber: Pardon me, your Honor.

Are you reading from the exhibit list or from the affidavit that is attached to the search warrant and the receipt that was—

The Court: I am reading from the report of Special Agent LaRue filed February 25th. It says, "The following items were seized by . . ."

Mr. Farber: Good. I just wanted to follow along with the court. Thank you, your Honor.

127

The Court: Now, I would like to look at the newspaper clipping which is mentioned on page 2.

Well, first of all, this item of registration card issued by Las Vegas Police Department, I am sure I know what that is.

Mr. Farber: Your Honor, that is not an exhibit in this motion to suppress and we do intend to return that to the defendant.

The Court: And the newspaper clipping is the next item.

Mr. Farber: Likewise, that is being returned, your Honor.

The Court: A sheet of white paper with red handwriting on the upper left-hand corner.

Mr. Farber: No, your Honor. Let me see. That is undoubtedly an exhibit in this proceeding, is it not?

The Court: There is no indication that it has been marked as an exhibit.

Mr. Farber: I believe it is, your Honor. Probably not under quite the same notation as that in the receipt that the court is reading.

The Court: Of course, I have no idea what this is.

128 Mr. Farber: May I consult with Mr. Barron? I think we can probably assist the court and actually determine—

Mr. Marks: May I state something before the court finishes? In going through the affidavit the court seem to indicate that there may have been a search incidental to an arrest here.

Mr. Farber: Yes.

Mr. Marks: I believe Mr. Farber would stipulate that the arrest of the defendant was on the street away from his apartment, and the search had already commenced, or at least maybe at the same time commensurate with the arrest but not contiguous in time and place. In other words, the defendant was not arrested in his apartment, but was arrested away from the premises.

Mr. Farber: That much is correct, your Honor.

Mr. Marks: So if it is—

The Court: Well, now, the matters taken from the apartment were all taken as a part of the search conducted under the search warrant?

Mr. Marks: That is correct, your Honor.

The Court: It was only the things taken from his person, I guess—

Mr. Farber: One item taken from his person.

Mr. Marks: One item taken from his person.

129 Mr. Farber: Your Honor, if I may actually obtain the exhibits I think we can pick out the item that the court is interested in.

Your Honor, it is Government's Exhibit 9 that I believe the report is referring to.

The Court: Well, I think that, then, is proper. Now, that is something proper and is a result of the search under the warrant.

Now, then, the 2 rolls of quarters.

Mr. Farber: Your Honor, we have no objection to returning those, though I think arguably they are instrumentalities.

The Court: Then No. 5 on page 5, phone slips. I take it those are bills, are they? What are those?

Mr. Farber: Your Honor, I do not believe they are. Your Honor, Government's Exhibit 17 is one of those items.

The Court: I take it they are both of the same character.

Mr. Farber: Before I represent that to the court let me double-check and be sure that they are.

Your Honor, the phone slip dated 2-22-65 does not appear to be an exhibit marked for evidence.

The Court: I think it ought to be excluded.

Mr. Farber: Thank you, your Honor.

130 The Court: It seems to me to be a record of a phone call, and it is the phone call which would be the act and not the record.

The same thing would be true of both 5 and 6.

Mr. Farber: May I leave them on the clerk's desk, the ones that will be suppressed, so that we will not get them mixed up?

The Clerk: You keep them separate over there.

The Court: Leave them right here.

What is the hotel stationery notation?

Mr. Farber: Your Honor, that is No. 10.

The Court: No. 10 on page 3.

Mr. Farber: Your Honor, we would submit that this probably is evidentiary as opposed to—

The Court: It will be returned, then.

Legal-size cardboard with phone number listed here as 17.

Mr. Farber: Your Honor, I believe the evidence would show that that is a notation of the phone number called in Boston and as such would probably be an instrumentality.

Mr. Marks: More likely evidentiary.

The Court: Well, that, of course, is the problem here, most of this—all of it is evidentiary that will not be returned.

131 National Airlines ticket.

Mr. Marks: That has been returned, your Honor.

The Court: The envelope with markings, No. 13. I have no idea what that is.

Mr. Farber: I believe, your Honor, that that is a betting slip.

Mr. Marks: Just because I don't object, your Honor, doesn't mean I accede to this.

The Court: Very well. It will be retained.

Mr. Marks, we have gone through this with the Government. I know you would register the general objection to the entire group. Is there any one of these items which you feel is evidentiary and not an instrumentality?

Mr. Farber: Your Honor, for the record may I hand the exhibits to defense counsel so that he may have them in front of him?

The Court: Yes.

Mr. Marks: Your Honor, I have no way of determining from looking at something whether—in my opinion everything that has writing on it which are books and papers of this defendant in his private apartment are evidentiary regardless of whether or not—well, they just are not instrumentalities of this crime.

So in going through a particular notation I can't

132 either admit that it is evidentiary or deny that it is an instrumentality.

The Court: Well, I didn't want to put you on the spot, but I felt that if there was some glaring point here that you wanted especially to bring to my attention—

Mr. Marks: Assuming that the court rules they are instrumentalities, I may have a quarrel with the ruling. But I am not going to quarrel with the particular exhibits.

The Court: Very well.

With respect to the items which have been mentioned, if they have not already been returned they are ordered returned. The others the Government may keep as instrumentalities of crime.

Mr. Farber: Your Honor, may we have permission to return the items that are not present in court today to him? Mr. Barron will take care of that.

Mr. Marks: That is satisfactory, your Honor.

There was this other query we had before the court whether or not the Government could or would or should be ordered to return to the defendant copies of his exhibits. Assuming that they were allowed to keep the originals which they seized, and assuming these are instrumentalities, doesn't that mean that the defendant no longer can ever get these matters returned whether or not re is ac-

133 quitted or convicted?

Mr. Farber: Your Honor, if we may be heard on that point, it is an important point, and we would make a distinction, your Honor, between the hadicap sheets which we think are not only instrumentalities but, further more, contraband since they are really necessary for this defendant or any man to work in the field of betting. For that reason we don't wish to be parties to assisting the defendant in continuing that activity.

Of course, in the matter of preparation for trial we have no objection to defendant inspecting those documents solely so that he will be familiar again with what they are.

The Court: Well, unless there is some other order of the court they should be admitted, I assume, as evidence in this case and they would become a public record. I suppose anybody could go up and copy them.

Mr. Farber: Of course, the court could order that they be sealed.

The Court: We could order that they be sealed. But I don't think that I want to rule on that right now. I think that, after all, the defendant may be acquitted.

Mr. Marks: That's right.

The Court: In which event I think everything would have to be returned back to him.

134 Mr. Farber: It would depend upon the ruling of the court at that time with respect to the items. For instance, your Honor, if we have a narcotics case and certain heroin is—

The Court: But an article in the Sports Journal isn't per se contraband.

Mr. Farber: No. But, your Honor, just so we do make our position crystal clear, we are not talking about the

things that came from the Sports Journal, only the handicap sheets which the defendant himself compiled from records and which is quite a voluminous compilation by the defendant of handicap material. That is the only item that we would object to giving to them.

The Court: Well, I think any motion you have to release—insofar as it is necessary for the preparation of the trial and to the extent that you need anything for the preparation of trial, I think you are entitled to examine them.

Mr. Marks: Simply what we are asking for, your Honor, is for the opportunity, if we so desire, to make copies.

Now, according to the Government's theory, they are contraband and I go in and I copy down sheet 1 of the handicap sheet and I have now in my possession contraband. I think that is the most ridiculous assertion
135 tion I have ever heard in my life.

These are handicap sheets like the National Daily Reporter—not the Daily Reporter, the scratch sheet on a horse race. That's a handicap sheet.

It may be an instrumentality of the crime of bookmaking but it is not contraband.

Mr. Farber: According to the defendant's own statement to your Honor, it has taken him years and years and years to compile these particular records.

So I think that ridiculous or not there is some distinction between these records and Sports—

The Court: Well, gentlemen, the reason I don't want to rule on it now is that I am not sure enough of what we are talking about.

Now it is very possible that these handicap sheets, although they have taken years to prepare, are out of date.

Have these games already taken place?

Mr. Marks: They have. But the sheets contain the names of the players in prior games, and you sort of guess at how a new game is going to be played by how the old plays went.

The Court: Well, what is the motion? Have you made a motion of some kind?

Mr. Marks: It wasn't a formal motion. It was
136 sort of agreed between the U.S. Attorney and I that we would present the question to the court be-

cause the United States Attorney was reluctant to return copies of what might be contraband or to aid and abet in the furtherance of some betting enterprise.

The Court: Well, I think that, as I said before, to the extent the defendant needs to examine these for the purposes of preparing a defense he is entitled to have them. Insofar as the return of any of this material is concerned or his right to make copies from it, such a decision will be determined after the outcome of the case. I will know more about it.

Mr. Farber: Thank you very muct, your Honor.

Mr. Marks: Thank you.

The Court: If there is no crime here I am going to have a hard time justifying holding anything.

Mr. Marks: The defendant is ready to plead, your Honor.

The Clerk: Has it been scheduled for that purpose?

Mr. Marks: Yes, it was scheduled for this purpose.

The Court: Yes.

The Clerk: There hasn't been an arraignment or a plea.

137 Mr. Marks: I believe there was an arraignment.

The Court: Just a plea.

The Clerk: Charles Katz is your full true name?

The Defendant: Yes.

The Clerk: And, of course, you have counsel with you here at this podium.

Are you ready now to enter a plea to the Indictment?

Mr. Marks: We are ready.

The Clerk: Do you wish to hear the Indictment read in open court?

Mr. Marks: Waive reading of the Indictment.

Defendant's Plea

The Clerk: Charles Katz, how do you plead to the offense charged in Count 1 of the Indictment?

The Defendant: Not guilty.

The Clerk: Count 2 of the Indictment?

The Defendant: Not guilty.

The Clerk: Count 3 of the Indictment?

The Defendant: Not guilty.

The Clerk: Count 4 of the Indictment?

The Defendant: Not guilty.

The Clerk: Count 5 of the Indictment?

The Defendant: Not guilty.

138 The Clerk: Count 6 of the Indictment?

The Defendant: Not guilty.

The Clerk: Count 7 of the Indictment?

The Defendant: Not guilty.

The Clerk: Count 8 of the Indictment?

The Defendant: Not guilty.

The Court: How long do you suspect this case will take?

Mr. Marks: I would estimate that it would be a day's trial propably by court, your Honor.

Mr. Farber: If it is the court, your Honor, I would say a day and a half.

The Court: Is a jury to be waived?

Mr. Marks: That is our intention. I wouldn't do it until the date, but as far as I know at this time, your Honor, we are contemplating a court trial.

Mr. Farber: If the defendant would waive jury we would have no objection.

The Court: What about the week of May 3rd?

Mr. Marks: I was going to request of the Court the week of May 17th.

The Court: Any objection?

Mr. Farber: No objection to that date, your Honor.

The Court: Very well. We will set it for the week

139 of May 17th.

The Clerk: In other words, we are going to set it for a jury trial as of now?

Mr. Marks: With the expectation that it will go court.

Mr. Farber: May we request, counsel, though, that if there is going to be a waiver that it be a few days in advance?

Mr. Marks: I will inform the Government and the court, your Honor.

The Clerk: The jury clerk is the one that will be interested.

The Court: If there is going to be a waiver will you notify counsel for the Government and the Court not later than one week prior to trial?

Mr. Marks: Satisfactory.

Mr. Farber: Thank you, your Honor.

Mr. Marks: Time and place?

The Court: It will be set on Judge Carr's calendar, master calendar to be called on May 17th at 9:30.

Mr. Farber: May the exhibits be returned to the Government at this time or should they be kept in the possession of the court?

The Court: Well, why should the court have
140 them?

Mr. Farber: Well, only for the purpose in case there is an appeal there might be some question about the items that were suppressed.

I will say to the court that by and large the same items will be used in evidence.

Mr. Marks: I see no objection to leaving them with the court marked as the exhibits they are. They will probably be in the same order.

Mr. Farber: It is within the discretion of the court.

The Court: Very well. They may be deposited in court.

(Hearing adjourned.)

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141 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

(Title omitted)

No. 34715 Criminal

Minutes of the Court—April 13, 1965

At: Los Angeles, Calif.

Present: Hon. Jesse W. Curtis, District Judge, Deputy Clerk: N. E. Brockman, Reporter: Jack Ellis, U.S. Atty, by Assistant U.S. Atty: Ben Farber, Defendant on bond, Counsel: Burton Marks

Proceedings: Hearing: Court's ruling on defendant's motion to suppress evidence:

Court makes ruling: Defendant's motion to suppress certain telephonic conversations is denied.

Defendant's motion to suppress Items taken at time of arrest is granted in part and denied in part.

Defendant pleas Not Guilty as to all 8 Counts.

Court orders case set for an estimated 1½ days Jury trial on May 17, 1965, 9:30 A.M. (possible Waiver of Jury.)

(File endorsement omitted)

142 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 3471-Criminal

Commissioner's Docket No. 42 Case No. 129

(Title omitted)

Motion to Dismiss Indictment (Rule 12, Federal Rules of Criminal Procedure)—Filed May 7, 1965

TO THE CLERK OF THE ABOVE ENTITLED COURT AND TO THE UNITED STATES OF AMERICA AND ITS ATTORNEYS:

Defendant CHARLES KATZ, by and through his attorney, hereby moves the court to dismiss the within indictment on the grounds that this court is without jurisdiction to proceed in that the statute upon which the indictment is based (18 U.S.C. 1084) is unconstitutional in violation of § 2 of Article 4 and Amendments One and Five of the United States Constitution.

This motion will be based upon all of the files and records of this case; upon the points and authorities submitted herewith and upon such further argument and points and authorities as shall be submitted to the court at the time designated for the hearing of this motion.

DATED: May 7, 1965.

/s/ BURTON MARKS

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143 **Points and Authorities in Support of Motion to Dismiss Indictment**

Section 1084 and § 1952 of Title 18 have been held to be at the very least ambiguous as to what situations they apply. See *U.S. vs. Bergland,* C.A. Wis. 1963, 318 F. 2d 159, cert. denied, 84 S. Ct. 129, 375 U.S 861, 11 Law Ed. 2d 88. The earlier *Bergland* decision (209 F. Supp. 547, reversed on other grounds) held that a strict construction must be placed upon the meaning of said statutes.

The criminal statute which fails to define the crime with sufficient certainty violates the constitutional guarantee of due process of law. This "void for vagueness" doctrine was stated in the leading case of *Conally vs. General Const. Co.* (1926), 269 U.S. 385, 46 S. Ct. 126, 127, 70 Law Ed. 322 as follows:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

Thus in the instant case, the statute provides in the first place that only those "engaged in the business of betting or wagering" are prohibited from doing certain acts. This phrase in itself has no defined meaning and a person doing any one of the prohibited acts would have to guess whether or not he might come within the purview of § 1084.

144 Furthermore, unlike the "bookmaking" statute, Congress has provided no excise tax on one engaged in the business of betting or wagering and is thereby placing impermissible sanctions on a business which may or may not be lawful in an individual state.

Secondly, assuming a person is in the business of betting or wagering, he would be guilty of violation of § 1084 if he transmitted through interstate commerce "information assisting in the placing of bets or wagers on any sporting event or contest." Theoretically then, any person in the business of betting or wagering who otherwise meets the conditions of the statute, would be subject to imprisonment for two years and a fine of $10,000.00 if he were to indicate in an interstate telephone conversation that the weather in California was "bright and sunny" where the recipient of this information used this information for the purpose of

determining what horse to bet who was running at a track in California.

It is further submitted that Congress has set up an unreasonable classification in exempting from the purview of the statute the transmission of the same information for use in news media or for the use of persons living in states where betting is legal to another person in another state where betting is also legal. Article 4, § 2 of the Constitution provides that:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

It is submitted that Congress cannot deviate from this mandate. Furthermore, it is submitted that it cannot be successfully argued that Congress can use the statute to implement state laws where betting is a crime. This is a matter which should be left to the criminal state prosecutions. See *Parr vs. U.S.*, 363 U.S. 370, 4 Law Ed. 2d 1277, 80 S. Ct. 1171.

145 Equally important is the proposition that the statute infringes and impedes upon the right to free speech and penalizes otherwise harmless conversation and transmission of information if the person putting forth the information is "engaged in the business of betting or wagering" whatever that means.

Whereas statutes are ordinarily presumed to be valid when a law appears to encroach upon a civil liberty or a civil right—particularly First Amendment protection such as freedom of speech, press, assembly, etc., there is a presumption that the law is invalid. See *Thomas vs. Collins*, 323 U.S. 516, 89 Law Ed. 430, 65 S. Ct. 315; *United States vs. Carolene Products Co.*, 304 U.S. 144, 82 Law Ed. 1234, 58 S. Ct. 778; *West Virginia State Board of Education vs. Barnette*, 319 U.S. 624, 87 Law Ed. 1628, 63 S. Ct. 1178, 147 ALR 674.

> ". . . It has been said that Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if directly attempted would be unconstitutional. See Hannegan vs. Esquire, Inc., 327 U.S. 146, 156, 90 Law Ed. 586, 592, 66 S. Ct.

456 . . ." *Speiser vs. Randall,* 357 U.S. 513, 2 Law Ed. 2d 1460, 78 S. Ct. 1332.

Respectfully submitted,

/s/ BURTON MARKS

146 (Acknowledgment of service omitted in printing)

(Filed endorsement omitted)

147 IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 34715-CD (CHC)

(Title omitted)

Opposition to Defendant's Motion to Dismiss Indictment—Filed May 14, 1965

The United States of America opposes defendant CHARLES KATZ's Motion to Dismiss Indictment in the above entitled case because, contrary to defendant KATZ's assertion, Title 18, United States Code, Section 1084, is not unconstitutional.

This Opposition is based on all of the records filed with the Court in the above entitled case and the attached Memorandum of Points and Authorities.

Respectfully submitted,

MANUEL L. REAL
United States Attorney

JOHN K. VAN DE KAMP
Assistant United States Attorney
Chief, Criminal Division

BENJAMIN S. FARBER
Assistant United States Attorney

/s/ BENJAMIN S. FARBER
Attorneys for
United States of America

A. *Title 18, United States Code, Section 1084, does not violate the Fifth Amendment by being vague and uncertain.*

In *Turf Center, Inc.* v. *United States,* 325 F. 2d 793 (9 Cir. 1963), it was contended that Title 18, United States Code, Section 1952, a companion section to Section 1084, was unconstitutionally vague. In answer the Court enunciated the applicable test at p. 795:

> "A statute meets the standard of certainty required by the Constitution if its language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . . The fact that in some cases it may be difficult to determine the side of the line on which a particular fact situation falls is not sufficient reason to hold the language too ambiguous to define a criminal offense. . . ."

Under this test, it would appear that Section 1084 is not vague, but defendant expresses some concern with the term "engaged in the business of betting or wagering". We do not perceive the problem. Certainly "business" is a word of common usage (see *Kahn* v. *United States,* 251 F. 2d 160 (9th Cir. 1958)). There seems to be common understanding among people with respect to the meaning of "wagering" or betting".

United States v. *Bergland,* 318 F. 2d 159 (7th Cir. 1963), is inapposite. The question presented in that case was solely: Is a "past posting" scheme *"any business enterprise involving gambling"* (the italicized language pertains to Section 1952, not to Section 1084), and the court merely said that there was no clear answer without resort to legislative history of the statute.

With respect to defendant's hypothetical, if Section 1084 were construed to cover the example presented, then it might be unconstitutional as applied—since in a felony prosecution of this sort, there is still the requirement
149 of *specific intent.* Intent is not present in the hypothetical.

B. *The enactment of Title 18, United States Code, Section 1084, does not violate Article 4, Section 2, of the United States Constitution.*

Contrary to defendant's assertion, Article 4, Section 2, of the United States Constitution, does not apply to the enactment of Section 1084, Title 18, United States Code. It has been held by the Supreme Court that Article 4, Section 2, of the United States Constitution, was enacted to prevent one state from discriminating against citizens of another, based solely on citizenship in the sister state.

New York v. *O'Neill,* 395 U.S. 1, 6 (1958); *Toomer* v. *Witsell,* 334 U.S. 385-395 (1948); *Hague* v. *C.I.O.,* 307 U.S. 496, 511 (1938), Opinion of Justice Roberts.

C. *Title 18, United States Code, Section 1084, does not violate the First Amendment to the United States Constitution by infringing on freedom of speech.*

Defendant claims that Section 1084 restricts freedom of speech. Yet he doesn't demonstrate how. Most words as such are harmless unless framed in a sinister context. If an actor says, "This is a holdup" in the course of a play, clearly that is a harmless statement. Yet that same language is rightfully penalized if spoken by an individual during the course of a robbery. It can't logically be contended that the latter is an infringement on the right to free speech.

In *United States* v. *Smith,* 209 F. Supp. 907 (E.D. Ill. 1962), the same contention was made; and rejected by the Court at page 918:

150 "The assertion that the statutes are unconstitutional as a restriction on freedom of speech is without merit. While the First Amendment provides freedom of speech, it does not guarantee or protect criminal conduct. There is no conflict between the statutes here involved and the guarantee of the First Amendment. These statutes do not restrict freedom of speech; they merely prohibit the use of interstate facilities to certain conduct which the Congress has declared to be illegal."

For all the above reasons, we respectfully submit that defendant KATZ's motion should be denied.

151 **Certificate of Service by Mail**

(Omitted in printing)

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152 IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 34715 Criminal

(Title omitted)

Minutes of the Court—May 17, 1965

At: Los Angeles, Calif.

PRESENT: Hon. CHARLES H. CARR, District Judge, Deputy Clerk: L. B. Figg, Reporter: Kay Wight, U.S. Atty, by Assistant U.S. Atty: Benjamin S. Farber, Defendant: on bond, Counsel: Burton Marks

PROCEEDINGS: HEARING motion of defendant, filed May 7, 1965, to dismiss the indictment for lack of jurisdiction in that the statute is unconstitutional;

JURY TRIAL (2 Days)

Defendant and government waive jury and written waiver is signed, approved by the court and filed.

Court orders case continued to 9:30 A.M., May 18, 1965, on request of defendant.

153 IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 34715 Criminal

(Title omitted)

Minutes of the Court—May 18, 1965

At: Los Angeles, Calif.

PRESENT: Hon. CHARLES H. CARR, District Judge, Deputy Clerk: L. B. Figg, Reporter: Kay Wight, U.S. Atty, by Assistant U.S. Atty: Benjamin S. Farber, Defendant: on bond, Counsel: Burton Marks

PROCEEDINGS: HEARING motion of defendant, filed May 7, 1965, to dismiss the indictment for lack of jurisdiction on the ground that the statute is unconstitutional;

TRIAL (jury waiver approved & filed 5-17-65)

It is ordered that this case is assigned to Judge Curtis for all further proceedings.

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154 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 34715 Criminal

(Title omitted)

Minutes of the Court—May 19, 1965

At: Los Angeles, Calif.

PRESENT: Hon. JESSE W. CURTIS, District Judge, Deputy Clerk: N. E. Brockman, Reporter: Jack Ellis, U.S. Atty, by Assistant U.S. Atty: Benjamin S. Farber, Defendant: on bond, Counsel: Burton Marks

PROCEEDINGS: HEARING: deft's mot to dismiss Indictment:

COURT TRIAL:

11:17 A.M. Court convenes. Attorney for defendant makes his arguments to the Court re motion to dismiss

Indictment. Attorney for Government makes argument in opposition to motion to dismiss. Court denies defendant's motion to dismiss and to suppress. Manuel Jacobs is called, sworn and testifies for Government out of order, and takes the 5th amendment. John R. Barry is called, sworn and testifies for Government. Government's exhibits 1 through 18 are marked and exhibits 1, 2, 4, and 5 heretofore marked are admitted.

12:00 noon Court in recess and reconvenes at 1:54-P.M. John R. Barry, heretofore sworn resumes testifying. Emmett B. Doherty is called, sworn and testifies for Government Government's exhibits 3, 6 and 8 heretofore marked are admitted. Judith Cunningham is called, sworn and testifies for Government. Government exhibits 7-A thru 7-K heretofore marked are admitted.

2:45 P.M. Court in recess and reconvenes at 3.02 P.M. Judith Cunningham, heretofore sworn is called, sworn and testifies further. Allen F. Frei is called, sworn and testifies for Government. Government's exhibit 19 is marked and admitted in evidence. Leo V. LaRue is called, sworn and testifies for Government. Government's exhibits 9 through 17 heretofore marked are admitted in evidence and exhibit 20 is marked for identification. Timothy L. Donovan is called, sworn and testifies for Government. Government's exhibit 21 is marked and admitted in evidence. Joseph A. Gunn is called, sworn and testifies for Government. Government's exhibit 18 heretofore marked is admitted in evidence.

Court orders Court trial continued to May 20, 1965, 1:30 P.M.

155 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 34715 Criminal

(Title omitted)

Minutes of the Court—May 20, 1965

At: Los Angeles, Calif.

PRESENT: Hon. JESSE W. CURTIS, District Judge, Deputy Clerk: N. E. Brockman, Reporter: Jack Ellis, U.S. Atty, by Assistant U.S. Atty: Benjamin S. Farber, Defendant: on bond, Counsel: Burton Marks

PROCEEDINGS: FURTHER COURT TRIAL:

1:49 P.M. Court convenes 2nd day of Court trial. Joseph A. Gunn heretofore sworn resumes testifying. Government rests its case.

2:35 P.M. Court in recess and reconvenes at 2:53 P.M. Attorney for defendant makes motion to strike Government's exhibits 1 thru 6 and the test between defendant and the F.B.I. Agents, and the Court denies said motion. Defendant rests its case.

Attorney for Government makes opening arguments to the Court. Attorney for defendant makes argument to the Court. Attorney for Government makes closing arguments to the Court.

Court finds the defendant Guilty to all 8 Counts as charged.

IT IS ORDERED that the defendant is referred to the Probation Officer for investigation and report and the case is continued to June 21, 1965, 2:00 P.M., for sentence.

Court orders defendant remain on bond.

3:30 P.M. Court adjourns.

* * * * * * * * * * *

158 **Transcript of Hearing on Motion to Dismiss**

Los Angeles, California, Wednesday, May 19, 1965. 9:30 A.M.

(Other matters heard.)

The Court: You may proceed in the Katz matter.

Mr. Farber: Thank you, your Honor.

Your Honor, may I lodge with the clerk exhibits which have been premarked Government's Exhibits 1 through 18? May they be marked for identification only?

Mr. Marks: Well, your Honor, I believe the Government may be a little bit premature. He may never have to lodge them, depending on the court's ruling on a motion that is pending.

The Court: Well, that is true. But they may be lodged.

The first thing to be considered by the court is a motion to dismiss.

Defendant's Motion to Dismiss and Defendant's Renewed Motion to Suppress Evidence

Mr. Marks: Yes, your Honor.

For the record I would like to state that I am also renewing the motion to suppress which the court has already heard.

The basis of the motion to dismiss, your Honor, is on the grounds that the statute under which the defendant is charged is unconstitutional either as applied or as it might be applied or on its face in that not only is it vague and ambiguous, but also the construction of
159 the statute is such that it violates the First Amendment protection as to the right of free speech without any showing of a clear and present danger.

It treats persons in similar situations with unequal force. In other words, some persons can make a phone call through interstate commerce. Assuming they are not in the business of wagering, they can make a bet in interstate commerce. Assuming that a person is in the business of betting or wagering, any statement which he makes is ipso facto a crime regardless of the innocent nature of the statement. This is without respect to whether or not the crime is one in the State in which the man is—

The Court: Well, the conversation, I take it, has to pertain to the completing of the bet. He can't inquire about the health of his mother-in-law.

Mr. Marks: But the example I gave in my motion was a person in the business of betting. Assume that fact. He gets on the telephone, talks to a friend in New York. The friend says, "How's the weather out in California?"

He says, "Bright and sunny."

This conversation is overheard through a wire tap or a bug being placed outside the telephone booth. Now, the person is arrested because he has relayed information to the defendant in New York regarding racing; that is, that it is a bright and sunny day.

160

This aids, as far as I understand, track handicappers immeasurably, or supposed to decide what horse they are going to bet on, whether it is going to be a mudder or a horse that runs better on a dry track.

So the type of information that can be given is of such a trivial nature that it can subject a person to a criminal offense.

I believe the authorities that I have cited, the Speiser case, deal with the rights of free speech.

I think that it has been firmly established now that the only time that Congress with the consent of the Senate or any State can pass a law abridging the rights of free speech directly or indirectly is where they can show that clear and present danger exists.

Now, the presumption that the Government takes is that it is a crime, that what Congress has done is to legislate against a crime. But that is not the fact. That is not what Congress has legislated against, because they have legislated against a person being in a particular business without respect to whether or not that business is legal or illegal.

They have not specially taxed the business like they have taxed the bookmaking business. I assume that if a person is in the business of betting and wagering he pays taxes on his bets just like anybody else. He can be, as a matter of fact, a handicapper, a professional handicapper who does nothing but go to the track and make his living by betting the track and having some skill and knowledge in the running of horses.

161

If that is his business and he uses the telephone for some information regarding the track—which is legal to bet—he is still guilty of a felony regardless.

Again I say the fact of giving betting information or wagering information is not in and of itself a crime, because Congress has specifically exempted from the purview of the statute news media which constantly transmit betting information, transmit odds on games back and forth across state lines over all these telephones.

What Congress has done, I believe, is placed an impermissible sanction upon the use of the telephone and the right to speak freely without any relation to the fact of whether or not the person engaged in the business is engaged in a criminal business or non-criminal business.

What they have done in effect, therefore, is deny the right of free speech by indirect prohibition and in some cases by direct prohibition. They have deprived the person of a property right without the process of law. In other words, the right to be in a business not in itself unlawful. I am speaking about the horse racing business. Because the States do countenance it. They make an exception if you place information from a State. I am talking about a bettor now only in that case where the wagering is lawful in one State to another State where the wagering is lawful, tnd ahe question is what is betting or wagering.

162

Now, if a person in California calls a person in New York about a race track, about track information, and wagering on a track is lawful, I still believe that under the purview of the statute he could be convicted.

And because of the statute's unequal application, because of the statute's vagueness, I still don't know what "in the business of betting or wagering means." Perhaps the Government does, it being omnipotent in that sense. But I don't think that those words have any commonly-defined meaning.

Well, I don't what "in the business of betting or wagering" means. I don't know and I don't think the court can say what is meant by transmitting of any information concerning betting across state lines. There is nothing about "in the business". There is a denial of equal protection.

163 Usually we talk about equal protection in the Fourteenth Amendment sense. But my understanding is that the due process clause of the Fifth Amendment related to the Federal Government also has this primary concept to it that you can't specially legislate. And each citizen is entitled to equal protection of the law and to be treated equally.

Here a person who may be doing something lawfully is denied the right to use a telephone across interstate lines to do the same thing that someone who is not in the business is entitled to do.

I believe the Indictment should be dismissed on that basis alone.

Mr. Farber: Your Honor, it is respectfully submitted that a court does not consider a question such as presented in this case in the abstract, especially when considering the constitutionality of a statute.

I think it is also well established that one branch of the Government such as the Judiciary, does not lightly declare unconstitutional the enactments of the other branch of the Government, the Legislature.

Now, with respect to the question in this case, is this statute so vague that it is unconstitutional, of course if there is any construction which would make the statute con-
164 stitutional, of course the courts would obviously favor such a construction and such a construing so as not to overrule an enactment of the Legislature.

Now, in this very Circuit, in a fairly recent case which is cited in our memo, Turf Center, Inc. v. United States, this Circuit was considering whether or not Title 18, United States Code, Section 1952, was unconstitutional as being void for vagueness.

Now, Section 1952 is important because it is actually a companion enactment to the section under question.

In that case the court said that a statute means the standard of certainty required by the Constitution if its language conveys sufficiently definite warning as to prescribed conduct when measured—and this is really the important language—by common understanding and practices.

So I think the words "engaged in the business of betting or wagering" when judged by common understanding and practice does have a definite meaning.

In addition, the Court of Appeals of this Circuit also said that the fact that in some cases it may be difficult to determine the side of the line on which a particular fact situation falls is not sufficient reason to hold the language too ambiguous to define a criminal offense.

165 Now, let's take the example that Mr. Marks has given; that is, somebody in California who may be a bettor's or a handicapper's livelihood calling up somebody else and in casual conversation saying, "It's hot and sunny out here today." Well, of course, that is possible and I don't think we are in a position at this point to determine whether or not it actually would be so, because that case is not before us.

But it is possible that if the statute were construed to apply to that individual it might be unconstitutional because, of course, we all know that when we are considering felonies of this type you, of course, have to have specific intent, intent to convey the information, intent to give information which will assist in the wagering field.

In the example given by appellant it would appear that there would be no specific intent, and if the statute were construed to apply there it might be unconstitutional as applied in that case.

Now, we would respectfully submit that in this case we don't have to worry about peripheral problems at all. We don't have to worry about uncertain factual situations because we believe—and, of course, if we are incorrect then the court could act subsequent to the evidence coming into this court—but we believe that the evidence in this case will show that bets were placed as such and that wagering information such as the line and that wagering information also involved discussions of credit line pertaining to wagers.

166

So we do not see that there was any unconstitutional abridgment of freedom of speech, nor that this statute is unconstitutionally vague.

Mr. Marks: May I speak from here?

The Court: Yes.

Mr. Marks: The difference between the Turf Center case and the statutes of 1952 and 1408 which we are dealing with—I guess it is—

Mr. Farber: Excuse me. 1084, counsel.

Mr. Marks: I am sorry. 1084.

1952 deals with conduct.

1084 deals with speech.

Now, true, there is always a strong presumption of validity in any enactment of Congress or any legislature. However, this strong presumption of validity does not apply where the statute encroaches upon freedom of speech.

The cases which I have cited, although they deal with obscenity, most of them do specifically go into this fact of what is the encroachment upon the freedom of speech, is it direct or indirect? Strong presumption
167 of validity does not apply where there is abridgment or encroachment upon the right of free speech. You can't lightly toss it off by saying, "Well, in some cases it might apply and in some cases it may not apply."

What you have to look to is, does the statute in effect say to the person, the track handicapper, "You may not speak over a telephone in interstate commerce, you may not transmit any information regarding race track even though that's your business, even though it is legal."

Once that statute—it seems to be that exact prohibition without any clear and present danger, then I believe it is invalid, and that is the distinction.

1952 again talks about other terms. What they were talking about was specific terms in 1952 dealing with vagueness. They didn't talk about in the business of betting or wagering. I don't believe that the case is in point except as any case might be in point that deals either with generalities of whether or not a statute is void for vagueness.

Some statutes are clearer than other statutes. I don't think that this statute is clear. I don't think that any person by looking at the face of the statute, who wished to make a phone call and place a bet, could tell whether or not his act was a felony under the federal laws or he was
168 free to engage in that conversation under the federal law.

Denial of Defendant's Motion to Dismiss and the Motion to Suppress Evidence

The Court: Well, we have had this question up several times and it has been in the courts a good many times, some phases of it. I don't think that there is any vagueness in the statute in itself. If there is any vagueness it may be as to its application. It is pretty clear that anybody who is engaged in the business of wagering is put in a classification and he is prohibited from entering interstate communications for the imparting of any information relative to gambling.

This business of wagering may not be a crime, but it does become so, that very act becomes so when Congress says that it shall not be done.

So the motion will be denied.

Mr. Marks: I assume the motion to suppress—

The Court: The motion to suppress will also be denied.

Mr. Farber: Shall we proceed, your Honor?

The Court: Yes, you may proceed.

Mr. Farber: May it please the court, in view of the fact that this is a court trial as opposed to a jury trial, and in view of the fact that this court has some familiarity with this case, unless the court desires I will not make an opening statement.

169 The Court: All right.

Mr. Farber: The Government calls as its—

The Court: Before we get the Government started here we will hear this other matter.

(Other matter heard.)

The Court: All right, Mr. Farber, I guess you may start again.

Mr. Farber: Thank you.

The Government calls as its first witness Mr. Jacobs. We will call him out of order because we understand he will take a certain position.

MANUEL JACOBS.

called as a witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name for the record.

The Witness: Manuel Jacobs.

Mr. Farber: Is it stipulated between defendant and the Government that Mr. Jacobs has the nickname of Rickey?

Mr. Marks: Yes, stipulated.

Mr. Farber: Thank you.

170 Direct Examination

By Mr. Farber:

Q. Now, Mr. Jacobs, do you know the defendant, Mr. Charles Katz? A. I respectfully decline to answer on the grounds that my answer may tend to incriminate me or degrade me in violation of my rights under the Fifth Amendment to the Constitution of the United States.

Q. Now, Mr. Jacobs, to your knowledge, on January 19, 1965, did Mr. Katz place a call out of state pertaining to wagering? A. I respectfully decline to answer on the grounds that my answer may tend to incriminate me or degrade me in violation of my rights under the Fifth Amendment to the Constitution of the United States.

Mr. Farber: So that I won't waste the court's time—

The Court: Is it your intention, Mr. Jacobs, to make a similar reply to any question which is asked you in connection with this case?

The Witness: Yes, your Honor.

Mr. Farber: I think I have nothing further, then, your Honor, of this witness.

The Court: Very well.

You may step down.

171 The Witness: Thank you.

Mr. Farber: The Government calls as its next witness Mr. Barron.

Mr. Marks: May the witness be excused?

The Court: I guess so.

Mr. Farber: It is agreeable with the Government, your Honor.

The Witness: Thank you.

Mr. Farber: The Government calls as its next witness Mr. Barron.

JOHN ROBERT BARRON,

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state you name for the record.

The Witness: John Robert Barron.

Direct Examination

By Mr. Farber:

Q. Now, Mr. Barron, are you familiar with one Charles Katz? A. Yes, I am.

Q. Do you see Mr. Katz in the courtroom today? A. Yes, I do.

172 Q. Where is he sitting, sir? A. Alongside of Attorney Burton Marks.

Mr. Farber: May the record—

The Court: The record may show the witness has identified the defendant.

Mr. Farber: Thank you, your Honor.

Q. Now, Mr. Barron, for the record, what is your occupation? A. I am a special agent with the Federal Bureau of Investigation.

Q. For how long have you been so employed? A. 11 years.

Q. And you are assigned to the Los Angeles office? A. Yes.

Q. For how long have you been so assigned? A. Since 1956.

Q. Now, were you the special agent who participated in the investigation of Defendant Katz? A. Yes, I am.

Q. And approximately when did the investigation begin pertaining to telephone calls, if you understand my question? I don't want to go—

Mr. Marks: Objection; irrelevant and immaterial and hearsay.

The Court: Overruled.

173 The Witness: February 4, 1965.

By Mr. Farber:

Q. Was a surveillance commenced pertaining to Defendant Katz? A. It was started. Yes, surveillance did commence at that time.

Q. On January 4th? A. On February 4th.

Q. February 4th. I am sorry.

Directing your attention to February 11, 1965, did you see Defendant Katz take any action on that date? A. Yes.

Q. What time? A. At 8:30 in the morning.

Q. And where? A. In the lobby of his apartment building, the Sunset Towers West, located at 8400 Sunset Boulevard.

We observed him in the lobby and walked to the east wing of the building where we knew to be located a telephone.

Q. Did you see him take any action with respect to that telephone?

Mr. Marks: Well, your Honor, I will object to the form of the question "take any action." It is vague and

174 ambiguous. Furthermore, that February 11th seems to be outside the scope of the Indictment. It commences on February 19, 1965.

The Court: Well, we have to give him some latitude in order to lay the groundwork, I suppose, for what happened, to interpret what happened.

Mr. Marks: Also "take some action" has a definite meaning in bookmaking circles.

The Court: All right. It is unfortunate.

Mr. Farber: May I reframe the question to satisfy counsel?

Q. Did you see Mr. Katz do anything with respect to the telephone?

Mr. Farber: That has no bookmaking connotation, does it, Mr. Marks?

Mr. Marks: I don't know.

The Witness: Might I explain that?

Mr. Farber: Yes.

The Witness: We did not see Mr. Katz enter the phone booth in that area. We observed him depart our view. We were outside in the front of the building.

Three minutes later he returned to the area wherein was located the phone booth. That is the only action we observed of Mr. Katz that date.

By Mr. Farber:

Q. Directing your attention to February 19, 1965, did you see Defendant Katz on that date? A. Yes, I did.

Q. And approximately when? A. At approximately 8:30 or just prior to that, minutes prior to that, in the morning of the 19th.

Q. And where did you see him? A. We saw him in a phone booth where there were located public phone booths in the area of approximately 8200 Sunset Boulevard on the Sunset Strip.

Q. What activity was he participating in, if any? A. He entered a phone booth, the middle phone booth of three phone booths, wherein is located telephone No. OL 4-9275, and appeared to be making a phone call.

Q. Approximately what time was this that he— A. He entered the booth, as I recall, at 8:29 in the morning and departed the booth approximately ten minutes later.

Q. Now, had you prepared the outside of the phone booth in any manner? A. Yes, I had.

Q. Would you describe that, please? A. Utilizing a tape recorder given the name of Edwards Recorder, we placed the recorder on the top of the middle phone booth in the back section, and from this tape recorder there emanated two microphones.

One was placed at the top of the middle phone booth in the back section on the outside and placed there, adhered there by tape.

The second was placed across to the easternmost booth and affixed to the outside of the booth in the same manner so as to record the conversation of Mr. Katz when we would so desire.

Q. Was there any penetration of the phone booth by anything physical? A. No, there was not.

Mr. Marks: Objection. It calls for a conclusion of the witness. As a matter of fact, there is physical penetration. There are sound waves.

The Court: Well, maybe you can restrict your question somewhat, counsel.

Mr. Farber: Fine. Thank you, your Honor.

Q. Did the microphone itself physically penetrate the phone booth? A. No, it did not.

Q. What about the method that you used to attach the microphone to the phone booth? Were any of the fasteners physically penetrating the phone booth? A. No, they did not. It was tape.

Q. Now, as a result of that telephone conversation
177 did you obtain a tape? A. Yes, we did.

Q. And from that tape did you prepare a transcript? A. Yes, we did.

Mr. Farber: May I have Government's Exhibit No. 1?

Counsel, is it stipulated that Government's Exhibit No. 1, which is a transcript, is an accurate transcript of the tape?

Mr. Marks: Yes.

By Mr. Farber:

Q. I show you Government's Exhibit No. 1, sir. Is Government's Exhibit No. 1 the transcript of that tape? A. Yes, it is.

Mr. Farber: Your Honor, I move that Government's Exhibit No. 1 be received in evidence.

Mr. Marks: Objection, your Honor.

This is purported to be—may I object to the introduction of this particular "statement" in evidence for the following two reasons?

No. 1—and I will state it again—it was obtained as a result of an unlawful search and seizure in violation of the rights of privacy of the defendant.

Furthermore, there has been no corpus delicti of the offense established and statements of the defendant
178 are not admissible for the purpose of establishing a corpus delicti.

Mr. Farber: May I be heard, your Honor, or is it necessary?

These are not confessions or statements as such. These would fall in the category of a statement of a defendant who is holding a gun during a robbery saying, "This is a bank robbery." That is in and of itself the corpus delicti.

I think counsel is confusing the question of admission or confession with perpetration of crime.

Mr. Marks: There is a certain corpus delicti in the statute. The first prerequisite before a statement of a defendant can be used is that he be engaged in the business of betting or wagering. Before you can establish or can use the statements that he made over the telephone to show that they were unlawful statements or unlawful information he must first establish that he was one of the persons within the purview of the statute and that they have now established. They can't establish it by the statements of the defendant. They must establish it by independent evidence.

The Court: Well, I don't know what the statements are. I am inclined to believe you are right.

It will be admitted subject to a motion to
179 strike if they are not connected up and if there is not a corpus delicti proved by some other means.

Mr. Farber: Thank you.

Mr. Marks: Thank you.

The Clerk: Your Honor, for the record here I had better indicate that Government's Exhibits 1 through 18 are marked for identification.

The Court: Very well.

(Documents were marked Plaintiff's Exhibits 1 to 18, inclusive, for identification.)

Offers in Evidence

(Document marked Plaintiff's Exhibit 1 was received in evidence.)

Mr. Marks: On that basis, your Honor, may it be stipulated that the same objection is made to the rest of the transcripts of the tapes, that they be admitted subject to a motion to strike?

Mr. Farber: Certainly.

The Court: Very well.

Mr. Marks: Very well. It will save a lot of time.

By Mr. Farber:

Q. Now, with respect to the date—excuse me. Before we go to the next date, when Mr. Katz finished his tele-

phone conversation, sir, did he leave the phone booth?
180 A. Yes, he did.

Q. Then what action did he take, if any? A. I immediately deactivated the microphone, which merely means turning off the microphone by switching a switch located elsewhere. The Edwards Recorder was located atop the booth.

Q. I think probably we should establish this for the record: Did you take any precautions to make sure that you did not pick up conversations of other individuals who might use the same phone booth?

Mr. Marks: Objection; irrelevant and immaterial.

The Court: Overruled.

The Witness: Yes, I did.

By Mr. Farber:

Q. What were those precautions? A. We had radio cars for our utilization in the FBI, and we communicated with each other on the surveillance. We have located agents in a radio car outside of the residence wherein Charles Katz resided. We had rehearsed, so to speak, the manner in which we would relay to me located at the phone booth that he was en route to that location through the radio transmission.

Therefore, on the morning of the 19th and thereafter an agent after seeing him leave the residence and
181 walk into the area of the booths, which would be in an eastern direction from his residence—I waited until I heard a radio transmission that he was in a specific location which we had so marked and noted, which was in front of a place called The Body Shop some block and a half removed from the phone booth area.

When he would reach this location I received this information by radio and would then at that time go over and actuate the microphone by switching it on.

We immediately when he left the booth would follow the same manner and deactivate. As soon as he was out of sight we turned it off and removed the equipment.

Q. Was this the procedure followed on each occasion? A. Yes, it was.

Q. Now, directing your attention to February 20, 1965, on that date did you see Defendant Katz? A. Yes, I did.

Q. Approximately when? A. At approximately, again, 8:30 in the morning.

Q. Where? A. In the same location at 8210 Sunset Boulevard wherein are located the three telephone booths.

182 Q. What did Mr. Katz do? A. He entered one of these phone booths, the middle booth, and again appeared to make a telephone call.

Q. Do you remember the phone number for that middle booth? A. Yes. OL 4-9275.

Q. At approximately what time was this? A. This was again at 8:30, 8:31, 8:29 in the morning; in that area.

Q. For how long was he in the phone booth? A. Again, I think this call was a short call of four minutes, four minutes he was in the booth.

Q. I show you Government's Exhibit No. 2.

Now, did you get a tape recording of the conversation in the telephone booth on the 20th also? A. Yes, I did.

Q. And from that tape recording did you make a transcript? A. I caused one to be made, yes.

Q. Is Government's Exhibit No. 2 the transcript of that tape recording? A. Yes, it is.

Mr. Farber: Is there a stipulation?

Mr. Marks: Yes.

Mr. Farber: Pertaining to Government's Exhibit No. 1, pertaining to Government's Exhibit No. 2? Same

183 stipulation?

Mr. Marks: The stipulation, if the court please, will apply to Government's Exhibit 1 through 6.

Mr. Farber: Thank you.

Mr. Marks: As well as the objection.

The Court: The objection also. Very well.

Mr. Farber: I move Government's Exhibit No. 2 be received in evidence, your Honor.

The Court: It may be admitted with the same reservation heretofore stated with regard to Exhibit 1.

Mr. Farber: All right.

(Document marked Plaintiff's Exhibit 2 was received in evidence.)

By Mr. Farber:

Q. Now, with respect to February 22nd did you see the defendant on that date? A. Yes, I did.

Q. Where? A. In the same location as previously described, 8210 Sunset Boulevard.

Q. Approximately what time? A. At approximately 8:30 in the morning.

Q. And for how long was he in the phone booth on that occasion? A. I believe a very short time. I think
184 three to four minutes.

Q. Now, on that occasion were you able to obtain a tape recording? A. No, we were not.

Q. Why? A. We had a malfunction of our equipment.

Q. Now, directing your attention to February 23, 1965, did you see the defendant on that occasion? A. Yes, I did.

Q. Where? A. 8210 Sunset Boulevard where the three booths are located.

Q. Approximately what time? A. At approximately 20 minutes to 9:00.

Q. Did you see the defendant take any action—strike that question.

Did you see the defendant perform any activity with respect to those booths? A. Yes. He entered the easternmost booth which bears telephone OL 4-9276. He stayed in this booth for approximately 10 to 15 minutes.

Then left this booth and walked into the booth in the middle where OL 4-9275 is and appeared to make a second phone call.

I should state that the first time he picked up
185 the receiver and dialed, indicating he was making a phone call in the first booth also.

Q. And on the 23rd were you able to obtain a tape recording? A. Yes, we were.

Q. I show you Government's Exhibit No. 4. Is Government's Exhibit No. 4 an accurate transcript of the tape recording that you obtained on that date? A. Yes, it is.

Q. Now, I believe that when we were talking about the 21st I asked you if you had obtained a tape recording, but I did not ask you if you had made a transcript of that tape recording.

Let me ask you again, did you obtain a tape recording of the telephone conversation on February 21st? A. I was

not there at the time the recording was obtained on that date, though.

Q. On the 21st. Thank you.

Now, with respect to February 24, 1965, did you see the defendant on that date? A. Yes, sir, I did.

Q. Where? A. At 8210 Sunset Boulevard at the three telephone booths previously described.

186 Q. Approximately what time? A. I think this was just a little later than normal. I think approximately 10 minutes to 9:00 in the morning.

Q. What activity did the defendant participate in, if any? A. During the time we had him under observation, which was approximately until a little after 9:00 o'clock in the morning, he entered two phone booths, the first one being on the eastern location, and appeared to make a phone call. That has the telephone number OL 4-9276.

He, if I am not mistaken, on this date left the phone booth area and took a walk prior to re-entering the middle phone booth. Then he appeared to make another phone call from OL 4-9275.

Q. Thank you.

Exhibit 5, please.

Now, did you obtain a tape recording of the defendant's half of the conversation on February 24, 1965? A. Yes, I did.

Q. Would you take a look at Government's Exhibit No. 5, please?

Is Government's Exhibit No. 5 an accurate transcript of that tape recording? A. Yes, it is.

Mr. Farber: Your Honor, I don't think I moved
187 for the reception of Government's Exhibit No. 4. I do now for Government's Exhibits No. 4 and No. 5.

The Court: 4 and 5 may be admitted subject to the same ruling heretofore made.

(Documents were marked Plaintiff's Exhibits 4 and 5 were received in evidence.)

The Court: We will adjourn until 1:30 this afternoon.

Mr. Farber: Thank you, your Honor.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 1:30 o'clock p.m. of the same day.)

188 Los Angeles, California, Wednesday, May 19, 1965.
1:30 P.M.

(Other matters heard.)

The Court: You may proceed.

Mr. Farber: Thank you, your Honor.

JOHN ROBERT BARRON,

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Farber:

Q. Mr. Barron, during lunch did you have a chance to refresh your recollection from your notes? A. Yes, I did.

Q. Now, with respect to February 24th would you tell us what activity took place on February 24th with respect to Defendant Katz? A. Yes. I believe I had prior testified to my recollection, the fact that Mr. Katz had entered a phone booth at 8210 Sunset Boulevard, OL 4-9276, and had taken a walk prior to entering the middle phone booth, OL 4-9275.

This is inaccurate on this date. On the 24th he went from the one phone booth, the first phone booth, directly to the middle booth. It was the 23rd in which
189 he had taken a walk prior to making a call from the other phone booth.

Q. In other words, on the 23rd he took a walk and then came back and made a phone call? A. That is correct.

Mr. Farber: I have nothing further of this witness.

Cross Examination

By Mr. Marks:

Q. Mr. Barron, do I understand that over the noon hour you refreshed your recollection from some notes? A. Yes, sir.

Q. Now, are you testifying from the notes that you refreshed your recollection or from your own recollection? A. I am testifying from my past recollection refreshed from my notes.

Q. But you do remember the events pretty well? A. Yes, I do.

Q. Now, you started investigating this on February 4, 1965; is that correct? A. That's right.

Q. And you put Mr. Katz under surveillance? A.
190 We had a surveillance of Mr. Katz, that is correct.

Q. Commencing on or about the 19th of February is when you put in a bug into the telephone booth?

Mr. Farber: Excuse me, your Honor.

I object to the term "bug." It has certain connotations which are prejudicial and are not an accurate description of this activity.

The Court: Well, I suppose that is true, although I am acquainted with what a bug is, that this was not. So perhaps we had better use some other terminology for the purposes of this questioning.

By Mr. Marks:

Q. A tapping device.

Mr. Farber: That, your Honor, I certainly would object to. I realize that the court is now familiar with the device. I make this objection because I want the record to be clear in case any other—

The Court: Very well. The record will show that the device which counsel is referring to is the device to which testimony has already been given here by this officer, by whatever name it may be called.

So you may proceed.

Mr. Farber: Thank you, your Honor.

By Mr. Marks:

191 Q. You understand what a bug is? A. In this case the microphone that was used?

Q. Yes. In a general sense. When I use the word "bug"— A. You are referring to the microphone that I used?

Q. That's correct. A. All right.

Q. Now, the first time you used a microphone or this type of device was on or about the 19th; is that correct? A. Specifically it was the 19th.

Q. All right. Now, between the 4th and the 19th you had Mr. Katz under surveillance? A. Not every day of that period; some days between those dates.

Q. On those dates that you did have him under surveillance he used a telephone booth? A. Yes, sir.

Q. Did he use other telephone booths than the ones that you said were located at 8210 Sunset? A. We didn't see him at booths other than those, no.

Q. In other words, the ones that are involved are the only booth that you ever saw Mr. Katz at during the period of surveillance? A. During the period we saw him, yes.

192 Q. Now, on the dates that you were making the recordings how many people were on your team? A. It varied from day to day, but it approximated every day five.

Q. Five.

Now, these phone booths are on the street on Sunset Boulevard; is that correct? A. That's correct.

Q. They are not within any other building or enclosure? A. There is no building adjacent to it.

Q. Right. There are three phone booths; is that correct? A. That is correct.

Q. One of the phone booths is out of order, or marked out of order? A. We placed one phone booth out of order.

Q. That was with the cooperation of the Telephone Company? A. That is correct.

Q. So that you could utilize the two booths to have two microphones, two booths much more convenient; is that correct? A. That is right.

Q. Mr. Katz lived at 8400 Sunset; is that correct?

193 A. That is right.

Q. And the phone booths are 8200 Sunset? A. That is right.

Q. Now, as he left 8400 approximately how many blocks in this in distance? A. It approximates five; four to five blocks.

Q. All right.

Now, as I understand, what would happen is that as Mr. Katz would leave his residence at 8400 Sunset and proceed easterly on Sunset Boulevard somebody there would announce the fact to you. A. That is right.

Q. Now, you were the one that was next to the phone booths? A. That is right.

Q. You would then go to the phone booth and switch the recording on? A. As he neared it, yes.

Q. What does "neared it" mean? A. I testified he was a block away, he was at The Body Shop which was a block away.

Q. Now, what precaution did you use in the event that somebody not Mr. Katz would walk into the booth and use the phone while the recording was going? A. I don't understand your question.

194 Q. Mr. Katz had a block to go before he would reach the phone booth? A. Yes.

Q. The recorder was going? A. Yes.

Q. If a third person whom you were not interested in hearing their conversation would walk into the phone booth what was your precaution to see that their conversation was not recorded? A. It did not occur. Had it occurred I would have turned it off.

Q. Just got over to the phone booth and switched it off? A. And secondarily it is a—I am not a technician, but as I had it explained to me, and I had to have it explained to me for purposes of use, it works on a stereo type basis in which A or B can be removed and if Mr. Katz was in the phone booth at the same time as another individual we would only be interested in Mr. Katz' conversations and we could control that.

Q. Anybody else go into the phone booths while Mr. Katz was on the phone? A. Yes, sir.

Q. Made phone calls at the same time? A. On one day a man dialed a number.

195 Q. What date was that? A. That was the 23rd.

Q. Did you make a recording of that? A. We did not listen to that recording.

Q. But it was recorded? A. It would be recorded, I would take it, yes.

Q. Mr. Katz used one or the other phone booth at random? A. He used one of the two on either date and on some dates both.

Q. Do you remember from your own memory now what booths he used? A. Yes.

Q. As I understand, the center booth was 4— A. 9275.

Q. —9275. And the eastern booth was 4-9276? A. 6.

Q. Now, on the 19th which one did he use? A. 75.

Q. 20th? A. 75.

Q. 21st? A. I don't know.

Q. You weren't there on the 21st? A. That's right.

196 Q. Or was there a malfunction? Or is that the 22nd? A. The 22nd.

Q. Who was present, do you know? A. Yes, sir. Special Agent Emmett Doherty.

Q. Is he present? A. Yes, he is.

Q. The 22nd? A. I believe 75.

Q. The 23rd? A. The 23rd he used 76 first and 75 second.

Q. On the 24th? A. The same, 76 first and 75 second.

Q. Did you testify about February 25th? A. I was not there.

Q. So you don't know if anybody else was in the phone booth while Mr. Katz was making a phone call on the 21st or the 25th? A. No. I was not there.

Q. Now, would you each day after Mr. Katz had made the phone call remove the bug? A. Yes, sir. Removed the microphone.

Q. The microphone. Excuse me.

What length of time would it take to put your

197 microphone on? A. A minute, two minutes.

Q. Now, it was the 23rd he arrived about 8:40 in the morning, made what you thought might have been a phone call? A. Yes.

Q. Then left; is that correct? A. Yes.

Q. Now, at that point you would have removed the microphone, wouldn't you? A. Yes.

Q. Did you? A. Yes.

Q. Then he returned? A. We received radio transmission that he was returning.

Q. So you put it back on? A. Yes.

Q. Did you have any reason to believe that he was going to be returning, or what? A. No.

Q. You just happened to be by the phone booth? A. Might I explain that?

Q. Please. A. On the 23rd he made his phone call and in the normal fashion of previous days returned
198 toward his apartment house. He had walked some half block or so away which was our normal procedure to remove the equipment, and we did so. Only on this date we received a radio transmission that he had reversed his direction and was returning to the area of the booths.

With the receipt of that, I was already at the booths, I was still standing there removing the equipment, so I just merely again secured it and left the area.

Mr. Marks: Thank you.

I have no further questions.

Redirect Examination

By Mr. Farber:

Q. I have just one question I would like to ask you about.

Directing your attention to the date February 12, 1965, did you see Mr. Katz place a telephone call on that date? A. Yes, I did.

Mr. Marks: I am sorry. I didn't hear the question or the answer.

(Question and answer read.)

Mr. Marks: Objection, your Honor; improper redirect.

The Court: I think you opened it up.

199 Mr. Marks: On February 12th.

The Court: You asked him if he had on any other occasion, as I recall, during the surveillance seen him put any other telephone calls.

Mr. Farber: Yes, your Honor.

The Court: Overruled.

By Mr. Farber:

Q. On that occasion what telephone booth was utilized by Mr. Katz? A. He used the first booth, the western booth

of the three, the one that we had previously blocked—I mean subsequently blocked OL 4-9116.

Q. Thank you. So that was still one of the three on Sunset? A. Yes, it was.

Mr. Farber: Nothing further.

Mr. Marks: I have nothing further.

The Court: You may step down.

Mr. Farber: The Government calls as its next witness Mr. Doherty.

200 EMMETT DOHERTY,

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name for the record.

The Witness: Emmett Doherty.

Mr. Farber: Your Honor, it has been stipulated between defendant and the Government that Mr. Doherty was the special agent who was present at the two telephone booths in question, those that have been previously testified to by Mr. Barron; that on the date of February 21st and February 25th he was special agent who activated the microphones; that on both of those dates he obtained tape recordings of telephone conversations—or he obtained one-half of telephone conversations from Defendant Katz, and that Exhibit 3 and Exhibit 6 are accurate typewritten transcriptions of the tape recordings; is that correct?

Mr. Marks: I will stipulate to that, your Honor.

The Court: Very well.

Offers in Evidence

Mr. Farber: Then, your Honor, I would move that Government's Exhibits 3 and 6 be received in evidence.

201 The Court: They may be admitted subject to the objection and the ruling heretofore made.

(Documents marked Plaintiff's Exhibits 3 and 6 were received in evidence.)

Mr. Marks: Your Honor, at some future time with respect to these exhibits and the tape and the conversations there I may ask the Government to express to the court—because I don't know what they are for—to make an offer

of proof as to these conversations. In other words, are they to prove that a bet was made or a wager was made or that gambling information was to have been transmitted, or some other information? Because there is a lot of conversation on these tapes that would have absolutely no relevance as far as I can see to the case. Of course, the Government might have a different idea.

Mr. Farber: Your Honor, at this time I am going to ask Mr. Doherty to read one of the exhibits to the court in order to save time rather than have him read all of them. I am going to ask him to read Exhibit 5 as representative of these exhibits.

The Court: I will, of course, read them all.

Mr. Farber: I, of course, assume you would your Honor.

May we have Mr. Doherty read Exhibit 5?

202 The Court: Yes.

Mr. Marks: For the record, that's a tape of February 24, 1965.

The Witness: Yes.

Direct Examination

The Witness: (Reading)

"The following is a transcription of a tape dated February 24, 1965 and marked 165-1496 which transcription was made in the office of the Federal Bureau of Investigation, 1340 West Sixth Street, Los Angeles, California:

"Good morning! Boston, Massachusetts, number 8 8 4 1 7 3 3—Station call—Area Code is 6 1 7.

"Right.

"Right—You want the two dollars? You want to get the number? Okay—Okay.

"6 5 4 9 3 7 6.

"Okay? (Sounds of coins in pay phone)

"Okey doke!

"Hi ya—Number is—70—right!

"Yes, sir!

"Pass

"Pass

203 "How—how much—let me call you back in a few minutes—Yea, Yea—give it to me—Yea—Correct—Right—Right—Right—Yes—

"What—the two pro games—What were— Los Angeles and Saint Louis—right.

"Thank you—I'll call you back.

"(23 seconds elapse until next call)

"Let me have Miami Beach J E 4 0 9 7 6, a station call —J E—Yes!—J E 4 0 9 7 6—Yea.

"Right—thanks—Right, I—6 5 4 9 3 7 6 is the number—Excuse me—(Coins being place in pay phone)

"Yea? —Jaffey—Yea—Jaffey? On the head.

"Give me Temple minus ten and a half for a dime.

"Pass

"Pass

"Pass

"Pass

"Pass

"Pass

"Give me Duquesne minus 7 for a nickel. That
204 will give me—

"Yea.

"So, I miss calls—I will settle up—so you have a nickel on Temple? Oh—fine—I knew I could do these things to you. So I—did you see Willie? —Oh—Yea—You know Benny that works for—Yea? So tell him hello too? —Yes —I am in L.A. Yea, the son of a b——— has been since he got a red check (strictly phonetic on red check)—Oh—Does he? —What goes on with them two? —Well, I'll—you, Jack—knows that he louses him up all the time—and how the hell this guy doesn't know nothing—and gets away with everything, so he took him in—What do you think? The outfit and the money and to keep him quiet—Yea—If you buy a big pizza you get a big winner and if you buy a small pizza—so the winner is not a pizza—Ah, I'll get out—Right—Righto—(Hangs up)

"Hu—

"Boston, Massachusetts, the number is 8 8 4 1 7 3 3, station call.

"I know the whole thing, honey.

"Yea—O L 4 9 6 7 5

205 "Yes it is.

"Yes, sir! Back again. Hello. It's okay—no harm done—righto. Right."

By Mr. Farber:

Q. Now, just so that the record is clear, your equipment—

Mr. Marks: Excuse me, counsel. I didn't speak up fast enough. But may the reading of the tape, this particular Exhibit 5, be subject to the same motion to strike?

The Court: Yes.

By Mr. Farber:

Q. Now, just so the record is clear, Mr. Doherty, your equipment was capable only of picking up Mr. Katz' part of the conversation, is that correct? A. It was capable of picking up both booths.

Q. Yes. A. On side of the conversation, yes.

Q. But Mr. Katz' side of the conversation is what I am getting at. A. Yes; not the other end of the call.

Q. Not the other end of the call.

Now, one more thing. On February 21st what time was it you saw Mr. Katz enter the phone booth? A. 9:30.

206 Q. And approximately when did he leave it? A. 9:37.

Q. What about on the 25th, what time? A. He entered the booth at 8:47, he left it at 8:49 and walked east on Sunset, reversed his direction, came back to the booth at about 8:51, completed his call about 8:57, and walked west.

Mr. Farber: Thank you.

I have no further questions of Mr. Doherty.

Excuse me. Yes, I do have.

Q. Now, Mr. Doherty, were you present at the arrest of Mr. Katz? A. Yes, I was.

Q. Who else was present at that time, sir? A. Agents Donovan and LaRue.

Q. When did that arrest take place? A. It took place immediately after Mr. Katz had left the booth and walked about a block west.

Q. On what date was this, sir? A. On the 25th.

Q. Now I should like you to see Government's Exhibit No. 8 for identification.

(At this point the exhibit was handed to the witness by the clerk.)

207 By Mr. Farber:

Q. Do you recognize Government's Exhibit No. 8? A. Yes, I do.

Q. Where did you first see it, sir? A. I first saw this being removed from the pocket of Mr. Katz.

Q. Incidentally, sir, at the time that Mr. Katz was arrested was he warned of his constitutional rights? A. Yes, he was warned that he did not have to make a statement, any statement that he made could be used against him in a court of law, and that he had the right to consult an attorney.

Q. Then subsequently this document was taken from his person? A. Yes.

Mr. Farber: I move that Government's Exhibit No. 8 be received in evidence, your Honor.

The Court: It may be received and admitted.

Mr. Farber: Thank you.

(Document marked Plaintiff's Exhibit 8 was received in evidence.)

Mr. Farber: I have nothing further of this witness.

208 Cross Examination

By Mr. Marks:

Q. Agent Doherty, on the 21st what phone booth did Mr. Katz use? A. I believe it was the center booth, 75, I believe.

Q. 75? A. I believe it was.

Q. How about the 25th? A. On the 25th I believe it was the eastern booth, 76.

Q. Now, it seems to be almost to the split second you have Mr. Katz entered and left the booth. A. Yes.

Q. Now, did you make a recordation at the time? A. Yes. At the time I made a record of when he was entering the booth and when he left the booth.

Q. How did you record it? A. I recorded it on a piece of paper.

Q. Do you have that piece of paper here? A. No, I don't.

Q. Does it still exist? A. The original piece of paper, no.

Q. So what you are testifying to is some memory of the time as related—when the notation was made it
209 was translated to your official report which you reviewed before you came to court? A. Yes.

Q. So to your knowledge the slips of paper that you made the notation on have been destroyed? A. The original slips, yes. I would have made the same day another recordation of the information.

Q. Do you have a distinct memory independent of the time? A. Do I have?

Q. The time that you saw Mr. Katz? A. On the 21st I have a distinct memory of it.

On the 25th I couldn't get down to the minute, no, if that is what you are driving at.

Q. What time did Mr. Katz leave his apartment on the 21st?

Mr. Farber: Your Honor, it assumes a fact not in evidence. It assumes the fact that this witness would know that.

By Mr. Marks:

Q. What time on the 21st exactly to the minute did you first see Mr. Katz? A. I would have seen him maybe five seconds before 9:30. The physical setup there is such that
when he would have come into my view he would
210 have been practically to the telephone booths.

Q. Weren't you stationed so that you could see him a block away? A. No. I would receive a radio communication as to when he was approaching. But I could not personally see him.

Q. What time did you receive the first radio communication— A. I didn't—

Q. —to the minute? A. I didn't make a log on the time that I received the call, but it was, I think, running between eight and ten minutes between when he would leave his apartment and when he would arrive at the phone booth.

Q. Can you give me the exact time that you received the radio communication?

Mr. Farber: Irrelevant and immaterial, your Honor.

The Court: Overruled.

Mr. Marks: Just testing—

Mr. Farber: Thank you.

By Mr. Marks:

Q. Can you— A. No.

211 Mr. Marks: That's all.

The Court: Anything further?

Mr. Farber: I have nothing further.

The Government calls as its next witness Mrs. Cunningham.

212 JUDITH CUNNINGHAM,

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name for the record.

The Witness: Judith Cunningham.

Direct Examination

By Mr. Farber:

Q. Mrs. Cunningham, what is your occupation? A. I am a business office supervisor with the Telephone Company.

Q. I should like you to take a look at the documents which comprise Government's Exhibit 7.

Mr. Farber: Counsel, Government's Exhibit 7 are photostats—Xerox copies which you have seen, may it be stipulated?

Mr. Marks: Defendant is willing to stipulate, your Honor, that the photocopies are true copies of the records of the Telephone Company kept in the ordinary course of business, and that the copies may be put in instead of the originals.

Mr. Farber: I wish to call defense counsel's attention to one document, though.

Mr. Marks: Did I miss one?

213 Mr. Farber: No, you didn't.

On one document there is an ink notation that it is February 22nd. It is my understanding that that was put in by some person unknown at a time subsequent to the making of the original document and should not be part of the record.

Mr. Marks: All right. Why don't we just scratch it out?

Mr. Farber: Fine, if that is agreeable to the court and counsel.

The Court: The stipulation, then, may be accepted.

By Mr. Farber:

Q. Now, Mrs. Cunningham, the documents which comprise Government's Exhibit 7, are they records that are kept in the ordinary course of business by the Telephone Company? A. Yes.

Q. And is it the ordinary course of business for the Telephone Company to keep such records? A. Yes.

Q. And are you the custodian of those records? A. Yes.

Mr. Farber: Now, may I approach and stand by the witness so I may direct her attention to certain documents?

214

The Court: Yes.

By Mr. Farber:

Q. Mrs. Cunningham, I would like you to take a look at the first document which is marked—A. February 19th?

Q. And Operator 586. A. Yes.

Mr. Marks: Can we, your Honor, for convenience's sake have these noted as subparts of Exhibit 7?

Mr. Farber: Certainly, your Honor.

Mr. Marks: So that they would be 7-A, -B?

The Court: Very well. Of course, I suppose they are dated, which gives them an identity.

Mr. Marks: That will be all right.

The Court: So he is referring to one of a certain date, the 19th. There is only one for the 19th, isn't there?

Mr. Farber: There are two. They have different operators, your Honor. It may be easier to go by submarkings, if it please the court.

The Court: Very well.

By Mr. Farber:

Q. Would you take a look at Government's 7-A? A. All right.

215

Q. Now, what is the date that that record pertains to? A. February 19th.

Q. Now, can you determine from that record what phone number was called? A. Yes. It was Area Code 617, telephone number 884-1733.

Q. Incidentally, do you know what area code that pertains to? A. Boston, Massachusetts, I believe.

Q. And according to this record, from where was the call placed? A. According to the record, it was placed from 654-9275.

Q. Now, how does the operator get the information from which the record is marked with respect to the place that the call is emanating from? A. She asks the person calling, "From what number are you calling?"

Q. So there is no automatic marking? A. No.

Q. Now, if the person making the call were to give the operator false information would she know that that was false information?

Mr. Marks: Objected to as calling for a con-
216 clusion of this witness as to what some other operator might or might not know.

Mr. Farber: Shall I qualify—

The Court: Well, I think he is talking about the custom of business and what the procedures are.

Mr. Farber: That is correct, your Honor.

The Court: Overruled.

The Witness: If the person calling gave the number as the same prefix and number, that could be a coin box telephone number, meaning it would have to be in the 9000 bank, she would take his word for it and would not know.

By Mr. Farber:

Q. So she could be given erroneous information and she would not know? A. Yes.

Q. Now, can you tell us at what time that call emanated? A. Approximately 8:34.

Q. And you are looking to determine that at the back of Government's Exhibit 7-A? A. Yes, the clock on the left.

Q. There are three clocks, are there not? A. Yes.

Q. You are looking at the clock on the left?
217 A. Yes.

Q. And the clock on the left tells you the time that the call was placed? A. Yes.

Q. Now, I notice there are two other clocks, one marked Minutes and one marked Seconds. Will you tell us what they tell us or tell you? A. The conversation—it tells how long the conversation lasted. Approximately three minutes and thirty-one seconds.

Q. Now, would you take a look at Government's Exhibit 7-B, please? A. February 19th.

Q. And to where was that call placed? A. The same telephone number, 617 884-1733.

Q. From what number did it emanate? A. 654-9275.

Q. And at what time was it placed? A. 9:54.

Q. Now, I show you Government's Exhibit 7-C. What

date does Government's Exhibit 7-C pertain to?, A. February 21st.

Mr. Marks: Pardon me?

The Witness: February 21st.

218 By Mr. Farber:

Q. What phone number was called, if you can tell? A. Area Code 617 884-1733.

Q. From what number was the call purportedly placed? A. 65—

Mr. Marks: Object to the designation where it was purportedly placed.

Mr. Farber: Your Honor, this witness can't determine that.

The Court: Overruled.

The Witness: 654-9475.

By Mr. Farber:

Q. And at what time? A. 9:31.

Q. How long did the call last? A. Two minutes thirty-three seconds.

Q. Now, I show you Government's Exhibit 7-D. What date does Government's Exhibit 7-D pertain to? A. February 23rd.

Q. What number was called? A. Area Code 305 534-0976.

Q. Where is that area code, if you know? A. That is Southern Florida.

Q. And from what number was the call pur-

219 portedly placed?

Mr. Marks: May I object, your Honor, to the continued use of the word "purportedly"? On the first conversation counsel for the Government asked what number the call was placed from. Now when it doesn't jibe with what he wants to compare it with he uses the word "purportedly."

Mr. Farber: Again, your Honor, my saying—

The Court: I don't think it makes any particular difference whether he says purportedly or otherwise.

The objection will be noted, but it will be overruled.

By Mr. Farber:

Q. Would you answer? A. The number comes from 654-9276 according to the record.

Q. At what time was it placed? A. 8:44.

Q. And for how long did it last? A. Two minutes and twenty-one seconds.

Q. Now, I would like you to take a look at Government's Exhibit 7-E. Now, to what date does that record pertain?

A. February 23rd.

220 Q. And what number was called? A. Area Code 617 884-1733.

Q. And from where? A. 654-9276.

Q. What time? A. 8:40.

Q. How long did the call last? A. Two minutes twenty-four seconds.

Q. Now, would you take a look at Government's Exhibit 7-F, please? What date does that record pertain to? A. February 23rd.

Q. Now, what number was called? A. Area Code 305 534-0976.

Q. I notice there are certain notations in the middle of this particular card.

On the third line down what is the notation? A. It says Miami.

Q. And what does that mean? A. The operator asks, the customer mentions where. She will often put it down, just write it down. They do it or don't. It depends.

Q. I see. So that would indicate the place called?

A. Yes.

221 Q. Now, would you tell us what was the number from which the call was purportedly placed? A. 654-9275.

Q. And at what time? A. 9:05.

Q. How long did it last? A. Three minutes and seven seconds.

Q. Now, Government's Exhibit 7-G, to what date does 7-G pertain? A. February 24th.

Q. And what number was called? A. Area Code 617 884-1733.

Q. And that is Boston, am I correct? A. Yes.

Q. From what phone booth did this call purportedly emanate? A. 654-9375.

Q. And at what time? A. About 9:00 o'clock on the nose.

Q. And how long did it last? A. About a minute or less.

Q. I show you Government's Exhibit 7-H, what date does 7-H pertain to? A. February 24th.

222 Q. What number was called? A. Area Code 617 884-1733.

Q. What was the number placing the call according to the record? A. 654-9376.

Q. And what time? A. 8:53 or -4.

Q. Now, I show you Government's Exhibit 7-I. A. Dated on February 24th. Area Code 305 534-0976.

Q. And where did it purportedly emanate from? A. 654-9376.

Q. And at what time? A. It looks like—it would be 8:56.

Q. How long did the call last? A. Almost three minutes.

Q. I show you Government's Exhibit 7-J. To what date does 7-J pertain? A. February 25th.

Q. And to where was the call placed? A. Area Code 305 534-0976.

Q. From where was the call placed according to the record? A. 654-9376.

Q. And when was the call placed, what time? A. 8:55.

223 Q. And for how long did it last? A. Three minutes.

Q. And finally Government's Exhibit 7-K, to what date does Government's Exhibit 7-K pertain? A. February 25th.

Q. And what number was called? A. Area Code 617 884-1733.

Q. From where did the call purportedly emanate? A. 654-9376.

Q. And at what time was it placed? A. 8:47.

Q. And for how long did the call last? A. One minute.

Mr. Farber: Thank you.

I have no further questions of this witness, your Honor.

There were three documents which were originally included in the envelope that was marked for identification as 7. I don't intend to use them for evidentiary purposes at this point. If defense counsel does not, may we withdraw them so there is no confusion in the record?

Mr. Marks: I don't want it to be said I caused confusion in the record, your Honor. I will stipulate that can be withdrawn.

224 Cross Examination

By Mr. Marks:

Q. Mrs. Cunningham, these records are photostats of IBM cards which the operator utilizes when a long-distance call is being placed; is that correct? A. Yes.

Q. And the operator marks down in the appropriate spaces the number which she purportedly is calling? A. Yes.

Q. And the number which she purportedly is receiving the call from? A. Yes.

Q. Now, is there any way that the Telephone Company has of verifying whether or not that call was placed by the operator other than that card? A. Are you saying could a call be placed to an operator without this card?

Q. No. I am saying— A. No. I am sorry.

Q. —aside from this card which is the operator's statement that she made the call is there any other independent evidence from the Telephone Company electronically or otherwise that shows that that call was in fact made? A. No.

Q. Is there any other record in the Telephone
225 Company that would indicate in any way from where the call originated other than the operator's notation? A. No.

Q. Now, I assume it is not operated by the operator, the time clock, it is just there and she slips a card in and it is a stamp; is that correct? A. Yes.

Q. She would then place a card in again for a second stamp after the call is completed? Or does that happen automatically when the receiver is hung? A. She must touch, push, whatever you want to say, the timer to let the timer know that the call is finished. She is the one who works that device.

Q. In other words, if she might be on another call for maybe two or three seconds or more, that the call might be longer than would—

The call itself might be shorter than that as indicated by the operator's punch? A. Yes.

Q. Now, how are these cards classified in the records? That is, if I wanted to check up on a call from a phone booth, for instance, 654-9275, assuming that I were able to get the records, would I get to the phone company and

say, "This is the phone booth I want to check up on," and that is how you would have the card
226 list? A. Yes.

Q. Is there an existing phone booth with the number 654-9475? A. No, there is not.

Q. Is there any way you could tell me why you know that? A. I have in my possession—it is not part of the exhibits—a record that that is a residence telephone number.

Q. But it is in the 9000 bank? A. That's right.

Q. Now, how does the operator determine if that phone is in the 9000 bank whether it is a residence or a home phone? A. Or a home phone?

Q. A residence of a pay phone? A. Pay phone?

Q. Excuse me. A. A pay telephone will, when a call is coming from a pay telephone booth, come in on a special spot on the board that sits in front of her. The light will come on. It says "Coin" right above it. You see, if someone is placing a call from a coin box the minute the person drops the dime in and it rings the operator,
227 well, she sees on her board that this is a coin-box call coming in, but she doesn't know what number belongs to that coin box.

Q. Now, will the operator fill out these same cards assuming that she has called to make a long-distance call—will she use the same cards regardless of whether it is from a residence phone or a telephone booth? A. Yes.

Mr. Marks: Thank you.

I have nothing further.

Mr. Farber: Just one.

Redirect Examination

By Mr. Farber:

Q. I am a little confused by your last answer.

In this particular case when records are checked may they be checked either for the phone that is placing the call or the place that is called? A. I don't follow you.

Q. In other words, let us assume that there is a Boston number and you have reason to believe that that phone number has been called from Los Angeles. May I ask the Telephone Company to search the records to determine if that phone number in Boston was called by a telephone in

Los Angeles giving you only the Boston telephone
228 number and the approximate date? A. No. The records are kept where the call starts from.

Q. I see. So then you must be given the information as to what number was placed or purportedly placed from; is that correct? A. Yes. There would be no record of this call in Boston; in other words, it is here in Los Angeles.

Q. And your records from Los Angeles would not indicate the Boston number; in other words, it wouldn't be catalogued by the number that was called? A. No, there would be no cross reference, no, sir.

Q. Well, then, with respect to the number that was called—and there was a non-existent pay phone, to your knowledge do you know how the Telephone Company got the information to search for that number?

Mr. Marks: Objected to as irrelevant and immaterial, your Honor.

The Court: May I have that question again?

Mr. Farber: Yes.

Q. In other words, for a non-existent pay phone.

The Court: You had better start over again, counsel.

Mr. Farber: All right, your Honor. Let me try it again.

229 Q. With respect to the number that belongs to a non-existent pay phone, do you know how the Telephone Company received information to check for that number?

Mr. Marks: To which I object as irrelevant and immaterial, calling for hearsay.

The Court: I still don't get it.

Mr. Farber: In other words, your Honor—

The Court: Do you mean somebody has asked the Telephone Company to check on a number which later is revealed is not connected with any pay telephone?

Mr. Farber: That's right.

Q. Who gave you the information to start the check? Let me see if I can ask it another way, your Honor.

A search of the records was conducted by the Telephone Company, was it not? A. Do you mean for these specific records (indicating)?

Q. Yes. A. All right.

Q. Was there such a search? A. Yes.

Q. Who requested the search? A. We received a subpoena to look for the records.

Q. And on the subpoena were certain phone
230 numbers specified? A. Yes.

Mr. Farber: Fine. I have nothing further, your Honor.

Mr. Marks: May I ask just a couple of questions?

The Court: Yes.

Recross Examination

By Mr. Marks:

Q. These records are, as I understand it, for the sole purpose of the Telephone Company determining what charges were made or which would be due and owing on the phone calls, is that correct? A. That would be true on a residence phone, but on a coin box we would have already collected the money most of the time. Should have. So we could not keep the record for future billing. We would keep it only for reference.

Q. Now, it is assumed by the Telephone Company that the telephone operator who marks down on that card that she has counted the box, as it were, that they have been paid; is that correct? A. Yes. And she has another spot on the card where it says Coin Pay that she marks.

231 Q. Right. So if she marks it there the Telephone Company assumes that it has been paid for, that call, and thus goes no further in checking; is that correct? A. Right.

Q. So if you have an operator that marks paid when in fact it was not paid the Telephone Company would have no way of checking unless they were directing their attention to this specific operator to see if she was doing that? A. That's correct.

Mr. Marks: Thank you.

The Court: Before we call another witness, the Grand Jury, I see, is here. We will suspend operations in the Katz case for just a moment.

Mr. Marks: May we stay?

The Court: We will take a recess in the Katz case for about 15 minutes.

Mr. Farber: Before I forget, your Honor, may I move Government's Exhibit No. 7 be received in evidence?

The Court: Yes. Exhibit 7 may be—

Mr. Marks: Could we perhaps wait until the return from the recess to hear a little discussion on that?

The Court: Very well. The offer has been made and there is no ruling as yet.

232 (Other matter heard.)

The Court: Do you have any further questions of this witness?

Mr. Farber: We have a stipulation, your Honor, and then I have a few short questions.

Counsel, is it stipulated between us that phone numbers 654-9475, 654-9375, and 654-9376 were residence phone numbers?

Mr. Marks: Yes, it is so stipulated.

Mr. Farber: Likewise, on the dates in question there were no charges to those residence telephones for either calls to Boston or Miami.

Mr. Marks: So stipulated.

By Mr. Farber:

Q. Mrs. Cunningham, I asked you one question before and I would like to reframe it.

If the phone company immediately after a call is placed is informed that a call is placed to a distant city, is there some way that the phone company can check for a record pertaining to that phone call receiving only the information of the phone number that is called plus the general area in which the telephoning phone is located? A. If we have the general location of where the call is being made from,

233 yes, then we can locate the ticket that the operator makes out, if it is done immediately.

Mr. Farber: I see. Thank you.

I have no further questions.

Mr. Marks: Nothing further, your Honor.

The Court: You may step down.

Mr. Farber: May this witness be excused, your Honor?

The Court: Any objection?

Mr. Marks: No objection.

The Court: Very well.

You may be excused.

Mr. Farber: The Government calls as its next witness Mr. Frei.

234 ALLEN F. FREI,

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name for the record.

The Witness: Allen F. Frei.

Direct Examination

By Mr. Farber:

Q. Mr. Frei, what is your occupation, sir? A. I am a special agent with the FBI.

Q. How long have you been so employed? A. Approximately 24 years.

Q. Are you assigned to the Los Angeles office? A. That is correct.

Q. I want to direct your attention to February 23, 1965. During that day from approximately 11:00 o'clock in the morning to 8:00 o'clock in the evening where were you located? A. I occupied Room 122 in the Sunset Towers West Hotel or Apartment Hotel.

Q. Was that located close to a room occupied by the defendant, if you know? A. That was immediately next door.

235 Q. Now, during the time between, oh, 11:00 o'clock in the morning to 8:00 o'clock in the evening did you overhear any conversation that the defendant carried on with any other individuals? A. Yes. He had several—

Mr. Marks: Well, now—

Mr. Farber: Just yes or no.

The Witness: Yes.

By Mr. Farber:

Q. And did you overhear any conversations that the defendant might have had by telephone call, restricting the overhearing only to his half of the conversation? A. Yes.

Q. Now, did you overhear these conversations through the aid of an electronic device or by the naked ear? A. By the naked ear.

Q. Now, did any of these conversations pertain to wagering?

Mr. Marks: Objected to as calling for a conclusion of the witness.

The Court: Overruled.

I take it that this is only preliminary and we will get the actual conversation at which time we can determine whether it has to do with wagering or not.

Mr. Farber: Yes, your Honor. Let me reframe
236 it, then, your Honor. I think it would be probably best.

Q. Did any of these conversations pertain to sporting events or obtaining the line? A. At approximately—

Mr. Marks: Your Honor—

Mr. Farber: Yes or no.

The Witness: Yes.

Mr. Marks: Same objection; calling for a conclusion of the witness.

The Court: Overruled.

By Mr. Farber:

Q. Now, what was the conversation?

Mr. Marks: Excuse me.

May I object now, your Honor? I would like the Government to make an offer of proof.

As I understand, what the charges here are are that the defendant made either bets or wagers or transmitted betting or wagering information over the interstate telephones. Now, there is no foundation that I know of for these conversations.

Furthermore, at the present time there is no corpus delicti for these conversations.

The Court: Well, I take it this is an attempt to prove the corpus delicti, so to the extent it shows, if it does show, that he was engaged in the business of
237 wagering—

Mr. Marks: Well, again here, then, I would state that you can't prove the corpus delicti by the statements of the defendant. They are hearsay and they are extra-judicial statements.

The Court: These are events, I take it—

Mr. Farber: Sure they are, your Honor.

The Court: These are events that constitute in themselves—this is not an admission, this is an event. I am only anticipating what the evidence may be. But if it does show events, even though these events are actual state-

ments made by the defendant which constitute doing business, the business of wagering or are evidence of that activity, then it is admissible. How convincing it is, of course, depends upon what it is.

Mr. Farber: Thank you, your Honor.

The Court: The objection will be overruled.

Mr. Marks: Thank you.

By Mr. Farber:

Q. Now, what was the conversation that you overheard? A. In one of the conversations Mr. Katz received a phone call. I overheard parts of his part of the conversation. I heard him refer to what I assumed to be—

238 Q. I don't want to know what you assumed, sir. Tell us what you heard. A. As nearly as I could hear it he made statements to the effect that, "I have Northwestern and 4."

Mr. Marks: Well, I will object to it and move to strike that portion that he made statements to the effect—

By Mr. Farber:

Q. Is this what he said or not? A. It is what he said. I cannot recall specifically that he would have Northwestern and 4. It could have been 2 or plus or minus, but—

Q. In substance? A. But that terminology in substance was utilized.

Mr. Marks: I will move to strike the answer of the witness, your Honor, as non-responsive. He was asked for the conversations and these are assumptions of the witness, conclusions as to the contents of the conversations, not the conversations themselves.

The Court: I understand that you are attempting to give us as near as you can recall the substance of the conversation.

The Witness: That is correct, your Honor.

The Court: Very well.

The Witness: I cannot recall—

239 The Court: Overruled.

Mr. Farber: Thank you.

The Court: The motion to strike will be denied.

Mr. Marks: Thank you.

By Mr. Farber:

Q. Would you continue, sir? A. Again it was "Oregon minus 4," "Northwestern plus 5," or "minus"; various colleges or athletic teams minus and/or plus. That was at approximately noon.

From approximately 5:30 to 8:00 o'clock that evening Mr. Katz made or received some 15 calls. Parts of the conversations I was able to overhear. I remember a distinct, "Sammy is the most honorable person in the world. Don't worry about the money. Also don't worry about the line. I called Boston three times today."

Q. Thank you. Was that the end of that conversation? A. That was the extent of the conversation.

Mr. Farber: Thank you.

I have nothing further.

The Witness: I don't mean to say, if I may, that this all occurred in one conversation. This is in several, the total sum of conversations that he had.

240 By Mr. Farber:

Q. Now, the discussion about Sammy and also, "Don't worry about the line," was that all one conversation? A. That was in one given conversation, I believe.

Mr. Farber: Thank you. That's what I wanted to clarify.

Cross Examination

By Mr. Marks:

Q. Agent, did you make notes of these conversations that you heard? A. As best I could under the circumstances.

Q. Do you still have those notes? A. I do not have them with me.

Q. Well, are they still in existence? A. I would assume so.

Q. Have you seen them? A. I refreshed my memory from them yesterday.

Q. Well, are they here on your person? A. No, sir.

Q. Do you know where they are? A. I don't know that they are there, sir, or not.

Mr. Marks: May I request that the Government—

Mr. Farber: Certainly. I was just determining where they are.

241 By Mr. Marks:

Q. Now, let me get this straight.

You listened in. You were in one room and Mr. Katz was in another room? A. That is right, sir.

Q. And you overheard how many conversations? A. Are you—

Q. By Mr. Katz with others? A. You are referring to telephone conversations?

Q. Well, were there other people in the room with Mr. Katz? A. At times. From time to time.

Q. All right. A. He had numerous visitors, people that I assumed lived in the apartment.

Q. How many conversations were those? A. Oh, I would say that he talked to at least three, possibly four different individuals.

Q. Did you make notes of these conversations? A. Not particularly, no, sir.

Q. Well, did you or did you not? A. Only to the effect that there was a visitor and perhaps a brief description in case we wanted to identify the visitor.

Q. Do you remember any of the conversations with
242 the visitor? A. Parts of the conversations.

Q. Do you remember the entire conversation? A. I could not at any time overhear the entire conversation, depending on whether he would be out on the patio or if he were in his room, whether he was facing directly to me where I could hear.

Q. Now, at noontime apparently there was a phone call received in. And part of the conversation Mr. Katz said something like, "I have Northwestern," "I have Oregon"; is that right? A. It was "have" or "had", I couldn't quite understand.

Q. What was the first word that Mr. Katz said after he said "Hello" on the phone in that conversation? A. I can't recall, sir.

Q. Can you recall any other portion of that conversation except those two specific bits? A. I can recall that the visitor that he had at the time spoke with the same person who had originally called Mr. Katz, and that when the visitor apparently knew who the caller was he asked if he could speak too, and when Mr. Katz finished the

other gentleman, the visitor, carried on a line—a conversation along the same general line.

243 When he finished he mentioned to Mr. Katz that he, the caller, was in 131.

Mr. Marks: May I move to strike the answer as nonresponsive?

Mr. Farber: Your Honor, I believe it is responsive. The only purpose of these questions can be to determine if Mr. Frei is recollecting correctly, and Mr. Frei responded.

The Court: What was the question?

(Question read.)

The Court: Well, it may go out other than the conversation.

By Mr. Marks:

Q. About how long was Mr. Katz on the phone on this conversation that we are talking about? A. I would estimate three to four minutes, both gentlemen.

Q. Well, how long was Mr. Katz on? A. Perhaps two minutes.

Q. The only recollection you have of that two-minute conversation is, "I have Northwestern" and "I have Oregon," or words to that effect? A. Yes, sir.

Q. Now, with respect to the 15 calls made or received between 5:30 and 8:00 o'clock, when was the first

244 call made or received? A. I do not recall, sir. Because of a radio or television which was playing. I could not hear the bulk of Mr. Katz' conversation.

Q. Or any of them? A. Or any of them.

Q. So what you are repeating now is bits and pieces of various conversations that you heard? A. That is right, sir.

Q. Of course, you don't know who was on the other end of the phone? A. No, sir.

Mr. Marks: Your Honor, I will move to strike all the testimony of the witness as to conversations or the bits and pieces related of the conversations on the ground that if the witness cannot relate an entire conversation he then can't relate a portion of that conversation. It is the same as, I would say, a tape recording which is defective and there are only bits and pieces which can be received. Unless

the entire recording is admissible the bits aren't admissible either.

Mr. Farber: Your Honor, I would request that counsel cite a case to that effect. Entire conversations never have to be admissible as long as the particular point in issue is covered. I think possibly the amount
245 of weight that should be given to it would be something for the court to consider. But certainly—

The Court: I think it only goes to the weight if he can't remember it all.

Mr. Marks: The motion is denied?

The Court: It will be denied. The motion to strike will be denied.

Mr. Farber: Excuse me, your Honor.

I am handing you the written document that you desired to see.

Mr. Marks: May I be excused for a moment? May I request, your Honor, that the witness—may I approach the witness, your Honor?

Mr. Farber: Pardon me, your Honor.

May we have these two documents marked for identification, then, as Government's Exhibit 19 if they are going to be used?

Mr. Marks: I have no objection.

The Court: Very well. They may be marked.

Mr. Farber: Mr. Clerk, do you have a stapler so we can staple them together?

The Clerk: Government's 19 marked for identification.

(Documents were marked Plaintiff's Exhibit 19 for identification.)

246 By Mr. Marks:

Q. Mr. Frei, was this the only day that you staked out that apartment? A. No, sir. I was there the following day as well.

Q. Listening through the—

Mr. Farber: Pardon me. Go ahead, counsel. I didn't mean to interrupt you in your questioning.

Mr. Marks: I will withdraw it.

Q. I believe that most of the conversation you overheard was through the electric plug in the wall, if I am correct. A. Yes, sir.

Q. You put your ear to the plug? A. Yes.

Q. You heard some of these conversations? A. That is right.

Q. Others were outside? A. Yes, sir. When he was on the patio and my window open he was just a few feet removed there, and I could hear clearly.

Q. All right. A. If he was in the room it was not clear, it was difficult.

Q. Now, did you make any notes of the following
247 day's conversation.

Mr. Farber: Pardon me.

Your Honor, we will object to this question. It goes beyond the scope of direct examination. We were very careful to limit it between the hours of 11:00 and 8:00 in the evening.

Also, of course, in the motion to suppress the Government stipulated it would not go into any conversations that were obtained after 8:00 o'clock, or the following day.

Mr. Marks: Well, your Honor, as I understand the purport of covering this witness' testimony it is to prove—I use the word advisedly—that he is in the business of betting or wagering.

Now, I would assume that the Government has evidence of the following day's observation which would prove otherwise, or to balance off the testimony that he was in the business of betting or wagering. I don't think that the Government can hide behind their placing of certain questions and conversations and not be compelled to produce the additional testimony which exists.

The Court: I think this is proper. You will be permitted to inquire into it.

Mr. Marks: Thank you.

The Court: The objection will be overruled.
248 Of course, you are opening the door.

Mr. Marks: I have done it before.

Q. You overheard conversations. On what date was it, the 23rd and also the 24th? A. That is correct, sir.

Q. What you have in your hand, Government's Exhibit 19, is your notes of the events that occurred on the 23rd? A. That is correct, sir.

Q. Could you kindly read these notes? A. In their entirety?

Mr. Farber: I move that the exhibit be admitted into evidence, your Honor. Then we certainly have no objection to it being read.

Mr. Marks: No objection.

The Court: Well, just the same, whether it is being read or admitted, he wants it read, to have it read.

The Witness: Would you like me to start reading?

Mr. Marks: Yes.

The Witness: (Reading)

"Stakeout of room 123, Sunset Towers Hotel, Feb. 23, 1965.

"2:02 p.m." —excuse me. That was a continuation page. But the top line is the same as the first page.

249 "11:00 a.m.—Stakeout establish—Chas. Katz, in short, sunning self at poolside outside room 123.

"11:29 a.m.—Male #1 approaches—'Hello Charley'—45 to 50—5' 11"—170—slender—dark brown hair—male talks of sending his ex-wife 'the contract.' Misc. chatter—

"11:42 a.m.—Male departs—stating hasn't had breakfast yet.

"11:50 a.m.—Male #2 arrives—5'8"—50ish—brown hair graying & thin at top—155—misc. chatter. Katz's phone rings—both he & male enter #123—Katz, on phone, comments re: Oregon State, Northwestern, Philadelphia, makes comments to effect 'I have (had?) NWest and four, etc.' Male #2 takes phone, speaks to individual Katz spoke with—along same lines as Katz—when finished tells Katz 'he's in 131.'

"12:14 p.m.—Male #2 departs.

"1:41 p.m.—Male #3 & female approach—with
250 coffee cups—came from room across the pool—asked Katz for milk—which he furnished—idle conversation.

"2:02 p.m.—Male & female return to their room.

"2:06 p.m.—Katz gets phone call—idle chatter—'Why didn't you tell me about that?—' 'I laughed in my sleep all last night'—'No, I wouldn't advise that"—

"2:11 p.m.—Katz at pool—still in shorts.

"2:36 p.m.—Katz enters his room—closes sliding door.

"2:38 p.m.—Sounds of shower running.

"3:14 p.m.—Katz calls out—asks for '131 please'—will call back later.

"3:31 p.m.—Door slams—no activity in room.

"5:35 p.m.—TV playing.

"5:44 p.m. to 8:00 p.m.—TV continues—Katz makes and/or receives some 15 calls over private & house phones—Overheard, over TV program, are following comments made by Katz 'Don't worry about money—

"Sammy is the most honorable man in the whole
251 country"—'Don't worry about the line—I called Boston 3 times today.'

"8:00 p.m.—TV off—door slams—all quiet.

"10:02 p.m.—Katz returns with 2 males—only one of whom has discussion with Katz. Discussion involves male's gambling indebtedness."

Q. Is that it? A. That is it.

Q. This discussion about the male's gambling indebtedness was not his indebtedness to Mr. Katz, was it?

Mr. Farber: Pardon me.

Your Honor, that is asking for a conclusion of the witness.

The Court: Overruled. If he knows he can answer.

The Witness: I do not know, your Honor.

The Court: What he means is, of course, the conversation didn't indicate that it was.

By Mr. Marks:

Q. Is that correct? A. Would you like me to relate the conversation?

Q. Do you have it? Do you remember it? A: There were two visitors only one of whom spoke to any
252 extent with Mr. Katz. The other one remained silent.

Q. I am talking about the 10:02 conversation.

Mr. Farber: Your Honor, we have another document that goes to 10:02 in my hand, but I wish to object to this conversation unless Mr. Marks is taking Mr. Frei as his own witness. Then, of course, I have no objection whatsoever because then I will be able to go into the door that is opened.

By Mr. Marks:

Q. Mr. Frei, I am asking a very simple question. From what you overheard of the conversation at 10:02 was there any indication to you that the male was discussing his gambling debts which he owed to Mr. Katz? A. The question was asked, "How much does it make today?"

Q. Who asked that question? A. The male visitor.

Q. I am asking you, did you receive the impression from the conversation that the male was discussing his gambling, that he owed money to Mr. Katz, his gambling debts? A. That there was an indebtedness. I do not know—I could not say owed by whom or to whom.

253 Q. Thank you. Room 131, is that the room across the pool? A. I do not know, sir.

Q. You didn't check out any of the other locations or persons that you investigated? A. No.

Q. You don't know whether there is a good-looking woman living in Room 131 or not? A. No, sir.

Mr. Marks: Thank you.

The Court: Any further questions?

Mr. Farber: Yes.

Your Honor, I would like a ruling of the court with respect to whether or not the door was open concerning that last conversation pertaining to the indebtedness.

The Court: It certainly was.

Redirect Examination

By Mr. Farber:

Q. I should like to ask, Mr. Frei, would you give us that full conversation, please, on the indebtedness? A. The male visitor inquired, "How much does it make today?"

Mr. Katz replied, "1440."

There was a discussion involving 1100.

The male inquires, "What is the total?"

254 Mr. Katz—there was agreement between Katz and the visitor, the total arrived at was 2320—

Mr. Marks: I will object to that latter portion and move to strike it as a conclusion of the witness.

The Court: Yes. You have used the word "agreement" which is a legal conclusion. I take it there was a conversation. Tell us what the conversation was.

Mr. Farber: That led you to use the word "agreement."

The Witness: The visitor asked, "How does it make today?"

The answer was "1440."

A discussion took place concerning 1100.

Then the visitor asked, "How much does it make, then?"

And I do not recall whether it was Mr. Katz or the visitor who stated, "2320 plus or minus the difference on the one game."

Mr. Farber: Thank you.

I have nothing further.

Recross Examination

By Mr. Marks:

Q. Did this conversation also take place while the
255 television was going? A. No, sir.

Q. What time did the television go off? A. Mr. Katz left at around 8:00 o'clock. So did I. He returned around 10:02.

256 Q. He left his room? A. Yes, sir.

Q. Didn't turn the TV back on? A. No, sir.

Q. By the way, do you remember what programs were playing that night?

Mr. Farber: Irrelevant and immaterial, I think, your Honor.

The Witness: I do recall on the radio that KMPC—

The Court: Overruled.

Mr. Farber: Thank you.

By Mr. Marks:

Q. KMPC? A. On the radio, yes, sir.

Q. And the TV? A. I could not hear.

Q. This was on the 23rd of February; is that correct? A. That is correct, sir.

Q. And at 10:02 two persons came into the room and one had this conversation which you have interpreted for us? A. (Witness nods head.)

Q. Is that right? A. That is correct, sir.

Q. Do you know the identity of those persons? A. No, sir.

257 Q. Did you ever see them earlier in the day? A I have never seen them to my knowledge. I don't know who they were.

Q. So, the only persons who you could identify were the persons you saw out in the pool area? A. That is correct.

Mr. Farber: I have nothing further, your Honor.

The Court: You may step down.

Mr .Marks: Excuse me.

By Mr. Marks:

Q. If there were two people enter the room and only one entered into the discussion how were you able to determine there were two people? A. While Mr. Katz was discussing with the one individual I was quite sure that a toilet had flushed. Also, when the conversation was concluding there was a discussion about sheets. Mr. Katz gave the visitor a sheet when a second voice came up and said he would like one, too.

Q. Is that a male or a female voice? A. Male, I believe.

Mr. Marks: I see.

258 Redirect Examination

By Mr. Farber:

Q. You say sheets. Do you mean like linen or— A. I—

Q. A bed sheet, or do you have any idea at all? A. I would have no idea. The term was sheets. That's all I know.

Mr. Farber: Thank you. Nothing further.

The Court: Do you have anything further to inquire of this witness?

Mr. Marks: No, your Honor.

The Court: You may step down.

Mr. Farber: The Government calls—

Offer in Evidence

The Clerk: Do you want that in evidence?

Mr. Farber: Yes.

The Court: It may be admitted.

Mr. Marks: What is this?

The Court: That's the statement you have read.

Mr. Marks: Oh. 19. Of course.

(The exhibit marked Plaintiff's Exhibit 19 was received in evidence.)

Mr. Farber: The Government calls as its next witness Mr. LaRue.

259 LEO LA RUE,

called as a witness by the plaintiff, having been first duly sworn, testified as follows:

The Clerk: Please state your name for the record.

The Witness: Leo LaRue.

Direct Examination

By Mr. Farber:

Q. Mr. LaRue, what is your occupation? A. I am a special agent with the FBI.

Q. And for how long have you been so employed? A. Approximately 12 years.

Q. Are you presently assigned to the Los Angeles office? A. Yes.

Q. Did you partake in the investigation of defendant Katz? A. Yes, I did.

Q. Now, directing your attention to February 25, 1965, were you present at the arrest of Katz? A. Yes, I was.

Q. Were you present when Mr. Katz was advised of his rights? A. Yes.

260 Q. And what was said at that time? A. Mr. Doherty advised him that he did not have to make any statement, any statement that he did make could be used against him in a court of law, and that he was entitled to an attorney.

Q. Now, sir, subsequent to that time, did you participate in a search of defendant Katz' living quarters? A. Yes, I did.

Q. Was that pursuant to a search warrant? A. Yes, it was.

Q. Approximately when was it that you commenced the search? A. We began at 11:00, 11:00 a.m.

Q. When did you finish, sir? A. At 1:35.

Q. Now, sir, I would like you to take a look at Government's Exhibit No. 9 for identification. Have you seen Government's Exhibit 9 prior to today? A. Yes, I have.

Q. Or I should say, have you seen the sheets that are contained within Government's Exhibit 9 prior to today? A. Yes.

Q. Where did you see them, sir? A. I obtained these in Mr. Katz' apartment.

Mr. Marks: Your Honor, I know I expressed the objection before, but may there be the same running
261 objection to the evidence procured pursuant to search warrant on the grounds of the original motion to suppress which has already been denied by the court? But I am renewing the motion.

The Court: Well, you haven't spelled out your grounds, but I assume you mean that by virtue of the alleged illegal obtaining of the telephone conversations which led to the arrest.

Mr. Marks: Well, not only that, but there was a further objection at the time the motion to suppress was made on the ground that the search warrants themselves were too general.

The Court: Oh, yes.

Mr. Marks: And exploratory. I'd like the record to show that I am again—

The Court: Very well. The objection may be deemed to have been made to this line of inquiry, and the same ruling. It may be overruled.

Mr. Marks: Thank you.

Mr. Farber: And to speed up the procedure, your Honor, I am sure there will be other exhibits along this line which—

The Court: Yes. You may have a running objection to all these exhibits.

Mr. Marks: Thank you, your Honor.

Offer in Evidence

Mr. Farber: I move the Government's exhibit be
262 received in evidence.

The Court: It may be admitted.

(The exhibit marked Plaintiff's Exhibit 9 was received in evidence.)

By Mr. Farber:

Q. I would like to show you Government's Exhibit No. 10, Mr. La Rue, for identification. Now I ask you, have you ever seen Government's Exhibit 10 prior to today? A. Yes, sir; I have.

Q. Where did you see Government's Exhibit 10, sir? A. I obtained this from Mr. Katz' apartment.

Q. Again, during the search? A. Yes; during the search.

Mr. Farber: I move that Government's Exhibit 10 be received in evidence, your Honor.

The Court: It may be admitted.

(The exhibit marked Plaintiff's Exhibit 10 was received in evidence.)

By Mr. Farber:

Q. Now, I'd like to show you Government's Exhibit 11 for identification, Government's Exhibit 12 for identification, Government's Exhibit 13 for identification, 14 for identification, 15 for identification, 16 for identification, and 17 for identification. Would you take a look at those exhibits in order, sir? I believe that Government's
263 —one of the exhibits is contained in an envelope. When I refer to the exhibit, I am talking about the contents of the envelope.

Now, will you look at them in order, please? A. Yes. I obtained all of these during the search, too.

Mr. Farber: Thank you. Your Honor, I move that all those exhibits, that is, Government's Exhibits 11 through 17, be received in evidence.

The Court: They may be received.

(The exhibits marked Plaintiff's Exhibits 11 through 17 were received in evidence.)

Mr. Farber: Thank you.

Q. Now, Mr. LaRue, during the course of your search did you see Mr. Katz? A. Yes; I did. He returned to the apartment.

Q. Approximately what time was this, sir? A. Ten minutes to 1:00 exactly.

Q. During that time did you have a conversation with him? A. Yes, I did.

Q. Now, who initiated the conversation, you or he? A. He did.

Q. Now, would you tell us who else was present? A. Special Agent Robert Rockwell.

264 Q. Now, would you tell us what was said? A. He asked about—

Mr. Marks: Excuse me, sir.

The Witness: Yes.

Mr. Marks: Objection on the same grounds, your Honor; there has been no corpus delicti established.

The Court: Overruled.

The Witness: With respect to the first item he showed me the large number of yellow sheets.

By Mr. Farber:

Q. Was that Government's Exhibit 9, sir? I think we should be— A. Yes, Exhibit 9.

Q. The contents of the envelope? A. He asked me if I was taking these records and I said, "Yes," that we were. And he asked when could he get them back. I told him I did not know.

And he says, "Without these records I am out of business."

And I said, 'What do you mean?"

He says, "Well, that's all I have done for thirty years. I know no other trade. I can't make $60 a week doing anything else."

And he went on to say that, about the FBI being involved in gambling. And I said, "If you had not bet

265 interstate we wouldn't be involved in this matter."

And he says, "Well, I cannot bet locally because the local bookmakers will not pay off."

Mr. Farber: Thank you. May I have just a moment, your Honor?

That's all I have of this witness.

Cross Examination

By Mr. Marks:

Q. Did you make any notes or recordations of this conversation? A. Not at the time, no, not while I was making—

Q. Did you make any subsequent notes or recordations? A. Yes, I did.

Q. And where are those?

Mr. Farber: I believe we have them, counsel.

The Witness: He has an interview report form.

Mr. Marks: May I approach the witness?

The Court: You may.

Mr. Farber: Your Honor, again, this—if this document is going to be used may we have it marked for identification as Government's Exhibit 20?

The Court: It may be so marked.

(The exhibit referred to was marked Plaintiff's Exhibit 20 for identification.)

266 By Mr. Marks:

Q. Showing you Government's Exhibit 20, is that the report that you made? A. Yes, it is.

Q. Is that the original? A. Yes.

Q. May I have it back? A. It is initialed by me.

Q. Now, the conversation you related is your summary of the conversation and not the actual conversation; is that correct? A. That—well, at best—it was a ver— what you have there is a summary. What I just gave was more of a verbatim of the conversation.

Q. Now, did Mr. Katz state to you on February 25, 1965, that he had been a handicapper for 30 years and knows no other trade or profession? A. That's in effect what I just testified to, yes, sir.

Q. Well, there is a difference between a bettor and a handicapper. A. He didn't say bettor, he said that was his business.

Q. All right. A. That these sheets are his business and that's what it's been for 30 years, and he knows no other trade.

267 Q. The business he mentioned was handicapping—

A. I concluded—

Mr. Farber: Pardon me, your Honor. That's a conclusion of the witness.

The Court: I think he is trying to get what the defendant actually said, and to that extent we are all interested, not what the witness concluded.

By Mr. Marks:

Q. Did he use the word "handicapper"? A. I can't specifically say that he did use the word "handicapper," no.

Q. Is it possible that he might have? A. Possibly.

Q. At least that word is in your report. A. Yes. I—

Q. Did he state that he developed his own system which is contained in the records you seized during the search? A. Yes.

Q. And those records are the yellow foolscap sheets? A. Yes.

Q. Did he state that these records are in a code known only to him? A. Yes.

Q. Did he state without his records he was out of
268 business? A. Yes.

Q. Did that have to do with the handicapping business?

Mr. Farber: Pardon me. It's a conclusion of the witness, your Honor.

The Court: Well, he can testify if he knows.

The Witness: My impression was that he was out of the business of betting based on his handicapping.

Mr. Marks: All right.

The Witness: I had the understanding from the way he was talking that he not only was a handicapper but also used this knowledge to bet with.

Mr. Marks: All right.

Q. Now, he was also questioned—he specifically said that they're handicap records, didn't he?

Mr. Farber: Asked and answered, your Honor.

Mr. Marks: Yes.

The Witness: No. He said these are his records. He didn't say what kind of records they were.

By Mr. Marks:

Q. Well, didn't he say, "You will probably think they are bookmaking records"? A. Yes.

Q. So he was indicating that they weren't bookmaking records, wasn't he? A. I don't know.

269 Q. You don't know? A. I don't know what he was indicating.

Q. All right. He indicated you cannot bet in Los Angeles as the bookmakers will not pay off; is that correct? A. Yes.

Q. He said that it was known throughout the nation? A. Yes.

Q. Did you ask him how accurate he was at football? A. Yes, I did.

Q. By that you meant accurate in his handicapping? A. No; in betting.

Q. Did you ask him "How accurate are you in betting"? A. Yes; "How many do you win in football?" Words to that effect.

Q. Did he say that he never kept percentage but he hit 10 for 10 frequently? A. Yes, sir.

Q. And often 10 for 15? A. Right.

Q. As far as accuracy was concerned? A. That's what he told me, yes.

Mr. Marks: Thank you. I have nothing further.

Mr. Farber: I have nothing further of this witness, your Honor.

The Court: You may step down.

270 Mr. Farber: The Government calls as its next witness Mr. Donovan.

TIMOTHY L. DONOVAN,

called as a witness by the plaintiff, having been first duly sworn, testified as follows:

The Clerk: Please state your name for the record.

The Witness: Timothy L. Donovan.

Direct Examination

By Mr. Farber:

Q. Mr. Donovan, what is your occupation, sir? A. I am a special agent with the FBI.

Q. And for how long have you been so employed? A. Approximately 18 years.

Q. And you are also assigned to the Los Angeles field office? A. That is correct.

Q. Now, directing your attention to February 26, 1965, on that date did you see the defendant? A. Yes, I did.

Q. And where? A. At the Sunset Towers.

Mr. Marks: Just a minute, your Honor. I object to this line of questioning as being outside the scope of the indictment. I'd like the Government to make an offer of proof as to the relevancy.

271 Mr. Farber: Your Honor, I think by the time we get the offer of proof—

The Court: It goes to the corpus delicti. He is still working at that, I suppose.

Mr. Marks: This is after the period of the indictment, the last date of the indictment is February 25th.

Mr. Farber: Your Honor, why don't we get the evidence in and after all the evidence is in, if it is inadmissible—

Mr. Marks: That's the way to run a lawsuit, throw all the evidence in and what doesn't apply—

The Court: What is the materiality? Perhaps you had better make an offer of proof.

Mr. Farber: Yes, your Honor. There was a discussion on the next day between Mr. Katz and the special agent pertaining to the exhibits that are now before this court.

The Court: Oh. Very well. The object will be overruled.

Mr. Farber: Thank you.

Q. Approximately what time was it, sir, that you saw defendant Katz? A. Approximately 10:30 in the morning.

Q. And was anybody else present with you, sir? A. Special Agent Emmett Doherty was with me.

272 Q. Where did the discussion take place? A. In the lobby of the Sunset Towers West, 8400 Sunset Boulevard.

Q. Now, were you there for any special purpose? A. Yes.

Q. And what was the purpose of being there? A. I intentionally had gone there to return two personal items to Mr. Katz which I had removed from his person the previous day and which were to be returned to him.

Q. Then a conversation ensued? A. That is correct.

Q. Would you tell us that conversation? A. Yes. What I had returned—

Mr. Marks: May I inquire on voir dire?

The Court: Yes.

Voir Dire Examination

By Mr. Marks:

Q. Did you advice Mr. Katz at that time that any statements he might make would be—might be used in evidence against him, that he had a right to an attorney, that he had a right to remain silent and not answer any of your questions? A. At that time he was not so—

Mr. Marks: I will object to any further statements.

Mr. Farber: May I ask a few questions, then, your Honor?

273 Direct Examination (Continued)

By Mr. Farber:

Q. Did you know whether or not Mr. Katz had previously been advised of his rights with respect to conversing with federal agents of the FBI? A. Yes, I did.

Q. Did you know that he had or had not been so advised? A. I was with Mr. Doherty on the previous day when he was so advised.

Q. Now, with respect to the exhibits that pertain to this case, who initiated the conversation pertaining to those exhibits? Was it you or Mr. Katz? A. Mr. Katz.

Q. Now, would you tell us what that conversation was?

Mr. Marks: Same objection.

The Witness: I returned to Mr. Katz a nail file and a key chain. Upon his taking them he said, "I can replace these for 35 cents. Why can't I have my records? Without my records I am out of business. I have been a handicapper and a bettor most of my life, and it has taken hours and hours and hours of compilation to prepare these records."

Mr. Katz continued as to the time factor in the records, and then suggested that if he could have his records
274 back he would continue betting. And he facetiously made the comment, "Then I can lead you to the big ones."

Mr. Farber: Thank you. I have nothing further of this witness, your Honor.

Mr. Marks: I don't know whether I offered the objection but I will, and make a motion to strike that again there is no corpus delicti established or basis or foundation for the admission of these statements.

The Court: Overruled. I think the—well, there is no point in arguing that. I think there is evidence here that the corpus delicti has been established.

Cross Examination

By Mr. Marks:

Q. Mr. Donovan, this was 10:30 in the morning on the 26th? A. Approximately 10:30 in the morning of the 26th, yes.

Q. Mr. Katz had been arrested the day before? A. The previous day.

Q. And can you estimate how far 8400 Sunset Boulevard is from the FBI office or this court house? A. I'd have to conjecture. I'd say six miles, probably.

Q. Perhaps ten? A. Perhaps ten.

Q. So you traveled ten miles to return to Mr. Katz
275 a key chain and a nail file? A. That is correct.

Q. Didn't you also have some intention of engaging in this conversation? A. I did not, and Mr. Katz was so advised.

Q. You did advise him you didn't want to have any conversation? A. Mr. Katz questioned as to why we came all the way out there at that time of the morning to return those two personal items. He said, "You must have some other alternative and some purpose."

We advised him strongly we did, we merely wanted to return those items to him.

Q. Did you make a notation of your conversations with Mr. Katz on the 26th? A. At that time I did not.

Q. Did you make a subsequent notation? A. I did.

Q. When was that notation made? A. On the afternoon of the 26th—

Q. You make out these reports when you are investigating something, don't you? A. This was dictated on my return to the office in the afternoon.

Q. Because it was pursuant to an investigation? A. Well, it was not an investigation, sir, no. At
276 that phase it was pursuant to a conversation Mr. Katz had with us.

Mr. Marks: May I see the report?

Mr. Farber: Certainly, counsel. Do you intend to use this in any manner? I would like to have it marked for identification if so.

Mr. Marks: May this be marked?

The Court: Marked as Government's exhibit next in order.

The Clerk: Yes. Government's Exhibit 21 marked.

(The exhibit referred to was marked Plaintiff's Exhibit 21 for identification.)

By Mr. Marks:

Q. You have seen this form before, haven't you? A. I have seen it previous, yes, sir.

Q. That's the one you dictated? A. I would presume so.

Q. Is there any particular name for this type of form in your Bureau? A. It has a form number, sir, and that is all.

Q. Well, FC 302 seems to be the form number. A. That is correct.

Q. You don't know what that stands for? A. It's just a federal form number.

277 Q. 302 form? A. It is referred to as that, yes.

Q. Is this the type of form that you ordinarily use when you make a report of an investigation of a subject in the FBI?

Mr Farber: Irrelevant and immaterial. Counsel is playing on the word "investigation" and substantially arguing with the witness.

The Court: Overruled.

By Mr. Marks:

Q. Do you understand the question? A. Yes. Under some conditions it is, sir, yes.

Q. Did Mr. Katz advise you that he had arranged to have an attorney? A. Mr. Katz commented that a friend was obtaining an attorney for him, that he hadn't met the attorney, that he believed he had an appointment to meet him on that following Sunday.

Q. February 28, 1965? A. I wouldn't know that, counsel.

Q. Now, you have heard Katz state he was out of business as a handicapper and bettor without his records taken from him by the FBI agents. He stated if he could have

those back he would continue to bet. Katz stated his records entailed hours and hours of work and could not
278 be replaced. Is that what he said? A. As I recall it is, yes, sir.

Q. What was the exact conversation? What did Mr. Katz say exactly? A. Reference to what specifically now, sir?

Q. Let's start from the beginning. What is the first word he said? A. Mr. Katz commented that he could—this will not be in quotes. That he could purchase the items returned to him for 25 cents in any drug store.

Q. Well, let's start from the beginning. Mr. Katz came down from his room or you went up to his room? A. Mr. Katz came up from his room pursuant to a phone call made to his room from the lobby phone.

Q. Did you make the first statement to him? A. Yes, I did.

Q. And you were now standing in the lobby? A. That is correct.

Q. What did you say to him? A. I shook hands with Mr. Katz and said, "Good morning, Charlie."

Q. What did he say? A. He said, "Good morning."

Q. He didn't say "Good morning, Tim"? A. He did not.

279 Q. Then what? A. I explained the purpose of our being there.

Q. No. What did you say? A. I said, "How are you, Charlie?"

Q. No. After you said, "How are you, Charlie?" what did you say? A. I said, "I am here to return two items that were taken from you yesterday."

Q. In fact, that was your only purpose for being there? A. That is correct.

Q. Then what did Mr. Katz say? A. Mr. Katz suggested we go over towards the settee in the lounge.

Q. What did he say? A. He motioned, "Let's sit down."

Q. All right. Did you go sit down? A. We went and sat down.

Q. That was you and Mr. Doherty? A. And Mr. Katz.

Q. Mr. Katz was in the middle between Doherty and Donovan? A. I don't recall, sir.

Q. What was the next thing that happened? A. Mr. Katz questioned, he said, "Well, this isn't why you came to return these things to me. What do you want from me?"

280 Q. What did you say? A. We said, "Nothing. We don't want anything from you, Charlie."

Q. Then— A. "We are not here to interrogate you."

Q. You are not here to— A. "We are not here to ask you any questions."

Q. Then what did he say? A. Then he went into a discussion of his records.

Q. What did he say? A. He said, "Why didn't you bring my records? Because without them I am out of business. I have been a bettor and a handicapper"—or "handicapper and bettor most of my life."

Q. What did you say? A. I told him that we had no control over the records, that we couldn't return them to him, and suggested he might contact the United States Attorney's office.

Q. All right. And what did he say? A. He made no comment to that.

Q. Then what did you say? A. It was at that time I inquired if he had an attorney.

Q. And he said— A. And he made the statement

281 that a friend of his had arranged an attorney for him and he had an appointment to see him on the following Sunday, the date of which I don't have.

Q. Then what did you say? A. He spoke then continuing. He went into the record aspect, how many hours he had worked preparing the records.

Q. What did he say? A. "You men have no idea of the time and hours that are expended in preparing these records and compilations. Spent hours and hours and hours." And he said, "They are irreplaceable."

Q. What did you say? A. I—

Q. "Sorry, Charlie"? A. I just agreed with him with the nod of my head.

Q. Then— A. Then he said, "Get those records back for me." Or "If I can have those records back I would continue to bet."

Q. He said those exact words? A. Yes.

Q. "If you give me those records back I would continue to bet"? A. "If I have those records back I would continue to bet." And then with a smile said, "And I can
281a lead you to the big ones" or "You can get the big ones."

Q. What did you say? A. I smiled.

Q. Was Mr. Doherty smiling, too? A. Yes, I believe he was.

Q. Then what was said? A. Mr. Katz terminated the conversation and said, "Well, I have no more to discuss." We shook hands.

Q. "That's all I want to tell you. Good-bye," he said? A. We shook hands and parted.

Offers in Evidence

Mr. Marks: I have nothing further. May this be 21 received, your Honor?

The Court: Any objection?

Mr. Farber: I have no objection.

The Court: It may be admitted.

(The exhibit marked Plaintiff's Exhibit 21 was received in evidence.)

Mr. Farber: Excuse me.

The Court: Just a moment.

Redirect Examination

By Mr. Farber:

Q. Mr. Donovan, just a couple of questions. Is it the policy of the Federal Bureau of Investigation for you to write up a 302 with respect to any pertinent conver-
282 sation you have with a subject or a defendant even if you did not seek to start that conversation? A. That is correct. That is the policy.

Q. Now, likewise, even if an item is a small item that is taken from a defendant and is of such nature that it should be returned, do you have a custodial problem if you do not return it? A. That is correct.

Mr. Farber: Thank you. I have nothing further.

Recross Examination

By Mr. Marks:

Q. Mr. Donovan, when you first called on Mr. Katz you invited him to come to breakfast, didn't you? A. I do not recall having done so, no, sir.

Q. Do you remember Mr. Katz saying, "Who wants to be seen with you"? A. Not specifically, no, sir, I do not.

Q. Words to that effect? A. Possibly. Possibly. I don't have a definite recollection of that, sir, no.

Q. Now, what time was that Exhibit 21 prepared? A. What time of the day you are referring to, sir?

Q. Yes. A. I have no record of that. But I would say it was the latter part of the afternoon.

283 Q. You saw Mr. Katz in the early morning; is that correct? A. In the mid-morning, sir.

Q. Mid-morning. Did you and Mr. Doherty discuss this Exhibit 21 as you were dictating refreshing one another's recollection of the conversation? A. Well, we discussed it before I dictated it. Whether Mr. Doherty was present when I was dictating it or not I don't know. Mr. Doherty did subsequently read it, however.

Q. You don't have any training like New York reporters to write with your hands in your pocket to make notes, do you? A. I have never been assigned to New York, sir.

Q. You weren't making notes while you were talking to Mr. Katz?

Mr. Farber: Asked and answered, your Honor.

Mr. Marks: I don't believe that it was.

The Court: Well, answer it again.

The Witness: I was not making notes while I was talking to Mr. Katz.

Mr. Marks: Thank you. That's all.

Mr. Farber: I have nothing further of this witness, your Honor.

The Court: You may step down.

284 Mr. Farber: May I inquire of the court, your Honor, how long the court would intend to go this afternoon?

The Court: How long will it take?

Mr. Farber: Well, we still have our expert witness. I might take at least, I'd say, a half hour to 45 minutes, your Honor.

The Court: Well, I have another matter tomorrow morning. We can't take this tomorrow morning. I was in hopes we could finish it tonight.

Mr. Farber: I was likewise in hopes of that.

The Court: Well, let's go for another half hour anyway and see how far we get.

Mr. Farber: Thank you, your Honor.

The Government calls as its next witness Mr. Gunn.

285 JOSEPH A. GUNN,

called as a witness by the plaintiff, having been first duly sworn, testified as follows:

The Clerk: Please state your full name.

The Witness: Joseph A. Gunn.

Direct Examination

By Mr. Farber:

Q. Mr. Gunn, you sound like you have a cold. Do you have some problem with your voice? A. Yes, I do.

Q. Do you want some water? A. No. That's okay. thank you.

Q. Now, Mr. Gunn, what is your occupation? A. Police officer for the City of Los Angeles assigned to the Administrative Vice Division.

Q. Do you hold any particular rank in the Administrative Vice Division? A. Policeman.

Q. For how long have you been a police officer with the Los Angeles Police Department? A. Five and a half years.

Q. For how long have you been in the Administrative Vice Division? A. Since August of 1963.

286 Q. And, sir, have you ever testified in court prior to today as an expert witness? A. Yes.

Q. When I say as an expert witness I am talking about in the field of gambling and wagering. A. In the field of bookmaking.

Q. Now, has it been on more than one occasion that you have testified? A. Yes, sir.

Q. About approximately how many times have you testified in court? A. In excess of a hundred times in Municipal Court and in excess of twenty times in Superior Court.

Q. When you use the term bookmaking, does that include all phases of wagering? A. Yes, sir.

Q. Now, have you ever written any material pertaining to wagering or bookmaking? A. Yes, sir.

Q. What material is that? A. It's the material that is used at the Los Angeles Police Department Vice School at the Police Academy pertaining to bookmaking as it is conducted in Los Angeles County, specifically sports bookmaking.

Q. And also have you ever taught any courses pertaining to the investigation of sports bookmaking?

287 A. I teach officers at the Los Angeles Police Department Vice School.

I also teach at Los Angeles State College at the Vice Institute, and I also give a class to Deputy District Attorneys for the County of Los Angeles.

Mr. Farber: Your Honor, I would respectfully submit that Officer Gunn has been qualified as an expert in the field of wagering and bookmaking.

Mr. Marks: An expert in what, counsel?

Mr. Farber: Wagering and bookmaking.

The Court: Well, he has, I believe, established a certain degree of expertise in the matter.

Mr. Marks: Well, perhaps in the area of bookmaking. And I assume for general purposes that you can't make a book without having somebody wagering on it.

The Court: There is sufficient proof here for you to proceed.

Mr. Marks: All right.

By Mr. Farber:

Q. Now, Officer Gunn, have you had the opportunity prior to coming into court to examine Government's Exhibits 1 through 6? A. Yes, I have.

Q. Are you familiar with the conversations that

288 are contained therein? A. Yes, sir.

Q. Likewise, have you had an opportunity, sir to examine Government's Exhibits 8 through 17, that is, all exhibits other than the Telephone Company records? A. Yes, sir.

Q. Now, would you take a look at Government's Exhibit No. 1?

(At this point an exhibit was handed to the witness by the clerk.)

By Mr. Farber:

Q. Now, sir, in your expert opinion—before we get to that, sir, with respect to Government's Exhibit 1, what date does it pertain to, sir? A. It pertains to February 19, 1965.

Q. Now, in your expert opinion was any information pertaining to wagering contained in the conversation that is represented by Government's Exhibit No. 1? A. Yes, sir.

Q. What information is that, would you tell us, please, sir? A. Information on the betting line for a sporting event.

Q. And would you please us the parts of the transcript which would pertain to the betting line? A. This
289 would be on page No. 5 which Mr. Katz has placed a call to Boston, Massachusetts.

Mr. Marks: Well, I will object to that and move to strike it.

Mr. Farber: You mean the phrase "Boston, Massachusetts"?

Mr. Marks: That he placed a call to Boston.

Mr. Farber: Fine.

Q. Don't go into where he placed the call, just the substance of the call. The other evidence will— A. Starting in the middle of the page there is a statement:

"Pass
"Pass
"Pass
"Pass
"Minus 5
"That's the early line, right?
"So, we will go through this, damn it!
"Seven—minus seven.
"Pass
"Pass
"Pass
"Minus seven—minus seven change
"Six
"Pass

"Minus eighteen
"Seven
"Minus ten
"Six with a seven—You are going to try? You going to put me on that one? —Just what I need.
"Pass
"What you need?"

Q. Now, other than information pertaining to the line was there any other information contained in the transcript? A. Yes, throughout the transcript.

Q. Pertaining to wagering? Go ahead. A. Throughout the transcript there is a discussion on a claim of disagreement between Mr. Katz and the party he is talking to as to whether Mr. Katz has won his wager or he has lost. Specifically that Mr. Katz is playing this wager for somebody else with somebody else's money and that he only has a piece of it.

Mr. Marks: I will object to that as calling for a conclusion of the witness, outside the scope of his expertise.

The Court: Overruled.

By Mr. Farber:

Q. Would you continue, sir? Would you please
290 read us the language which gives you that information to the extent that he is betting for somebody else? A. It starts on page No. 1 approximately at the middle of the page. First he says, "want to pay the money and get it over with". On down he says:

> ". . . my guy—How can they do a thing like that to him—at least, they could have done was to have called the bet off—and found out and then I could have saved the eight dollars".

May I refer to my copy, sir, where I already have it marked?

Mr. Farber: Would that be agreeable to the court?

The Court: Surely.

Mr. Farber: And counsel?

Mr. Marks: No objection.

Mr. Farber: Fine.

Should we have those marked for identification, your Honor?

The Court: I don't think you need to. If the defendant wants to look at them and examine them, if he wants to put them in he may. But these are, as I take it, notes which this witness has made after reviewing the evidence which is in for the purpose of aiding him in testifying.

291 Mr. Marks: As I understand he has taken copies of Exhibits 1 through 6 and made his own markings on copies of the exhibits for his own purpose. They are not notes—well, maybe they are notes.

The Court: Well, they are in the manner of notes or some indication to refresh his memory and to help him. They are aids in helping him testify here.

Mr. Marks: We may use them later, your Honor.

The Witness: On page No. 2 the last paragraph Mr. Katz is stating:

> ". . . this isn't my business—you know my play—I take a piece at a dollar or two—now, I—like this fellow is losing to—the fellow I am playing he is behind—"

On page 3 Mr. Katz states:

> ". . . that is why I have been doing good here— because sometimes—you know that I get different prices —two, three and four—for playing the—although, it is only a dollar—it adds up—"

And he goes on to say—

By Mr. Farber:

Q. Excuse me. Let me interrupt at that point, Mr. Gunn. What is the significance of that conversation that

292 you just read? A. Mr. Katz is playing for somebody else and getting a percentage out of it. When he says he is only getting a dollar, this would mean that on a thousand-dollar bet he would be getting a hundred dollars in this instance.

Q. Is he using what is called the nickel system? A. Yes, sir.

Q. In referring to his bets? A. Yes.

Q. What is the nickel system? A. The nickel system is terminology in which a $500 bet would be called a nickel,

a $1,000 bet would be called a dime. The $100 bets are usually referred to as a dollar or two dollars.

Also when you record on the nickel system you omit to the right of the decimal point so that $2,500 would be written 25 and two small zeros rather than writing four decimal point zero zero.

Q. Fine. Would you continue where I interrupted you? A. Mr. Katz then states:

"... to take twenty one dollars, and I told him, eight is the other fellow's, and two—and give the other fellow eight dollars which he knows I am win-
293 ning—I am not putting no claim—I am giving the other guy eight dollars— and I'll go the eight dollars and you go the twenty-one and you'll bust me up—"

Later on he states:

"... so, last night he flies into me and says to get it straightened out—He loves to play, now he is out with some fellow here—He is always killing the guy—"

And then beyond that:

"... otherwise I would have been through but he needs me for this—"

Q. Now, with respect to this same conversation on February 19, 1965, was there any credit information exchanged? A. Yes, sir.

Q. What was that, sir? A. Well, on the next to the last page, page 5, Mr. Katz states:

"Hello? Listen—I just spoke to Elliott—He gave me, an extension oh good he will give me credit for eleven and I can owe twenty—"

Q. Now, is credit a common practice in bookmaking? A. Yes, especially in sports bookmaking.

Q. Now, sir, would you go to February 20, 1965,
294 which would be Exhibit 2.

Now, with respect to Exhibit 2 was there any information transmitted pertaining to wagering? A. Yes.

Q. What was that?

Mr. Marks: Do you mean the witness is testifying to his opinion?

Mr. Farber: Oh, yes, of course.

The Witness: Mr. Katz is asking for the betting line.

By Mr. Farber:

Q. And does he get it? A. apparently receives it because he is repeating. Do you want me to repeat the whole line?

Q. Just start it anyway. A. Oh. He makes statements like "Pass, Pass," "Maryland minus 4," "25 Duke," "Western Kentucky," "Saint Joe—minus 5½."

Q. All right. A. Mr. Katz then states, "You want me to call them back to you?" And then he proceeds to read out collegiate teams, giving the line such as "Maryland minus 4," "Alabama plus 7," and some of them correspond with the ones that he had received in the earlier part of the conversation.

295 That is the total content of that day.

Q. Now, I would like you to take a look at Government's Exhibit 3 which pertains to February 21, 1965. A. Yes, sir.

Q. Now, in connection with Government's Exhibit 3, in your opinion was there any information transmitted with respect to wagering? A. Yes, sir.

Q. What was that information? A. Mr. Katz had placed a wager on this date.

Q. Oh. He actually placed a wager? A. Yes, sir.

Q. Would you please read us the portion of the transcript which pertains to the placing of the wager? A. Mr. Katz states, "Give me Duquesne—for a dime."

Q. Now, under the nickel system, then, that wouldn't really be a dime, that would be a thousand dollars; is that right? A. Actually it would be $1100. He is placing an $1100 bet to win a thousand dollars, but he would say, "Give me a dime," a thousand dollars.

Q. Is that the common way of expressing a bet? A. Yes, sir. The vigorish on the bet is automatically added
296 to it and it is understood by both the bookmaker and the bet maker.

Q. Is it your opinion that he is placing these bets with a bookmaker? A. Yes, sir.

Mr. Marks: Objection to the last, calling for a conclusion of the witness, outside the scope of his expertise.

The Court: I think this is all part of the procedure of the bookmaker. And if he can testify—

Mr. Marks: Well, I don't think that any expert, I don't care who he is, can testify in his opinion whether or not a bet is placed with a bookmaker or with another bettor.

Mr. Farber: May I ask him to back up his opinion?

The Court: Very well, you can inquire further.

Mr. Farber: All right.

Q. Can you tell us why it is a bookmaker as opposed to another bettor? A. Yes. I have also reviewed the records that you have referred to and I find this particular bet where he says, "Give me Duquesne—for a dime." Now, that is a thousand-dollar bet. If he was playing with another player it would be a thousand dollars against
297 a thousand dollars.

But he lost this particular bet and on the side he put "Minus 1100" which indicates that he had to be playing with a bookmaker, because a bookmaker will take the vigorish on the bet.

Q. Now, is there any other reason why you are of the opinion that it is being placed with a bookmaker as opposed to another bettor? A. I have very seldom seen—I have never seen players who are playing head-to-head gambling action give each other a rundown on the line on all the teams that are about to be played.

Q. That is something that is peculiar to a bookmaker? A. It is peculiar to a bookmaker only, yes.

Mr. Marks: Could I inquire on voir dire?

The Court: Very well.

Voir Dire Examination

By Mr. Marks:

Q. How many conversations in your lifetime have you heard between bettors and bookmakers? A. Between bettors and bookmakers?

Q. That's right. Excluding police officers. A. Excluding the ones that I have personally made?

297a Q. Yes. A. I would say probably in excess of 500 conversations in which I was the feigned bookmaker and in which a bettor called me after I had entered a bookmaking location.

Q. How many conversations have you overheard between bettors and bookmakers or bettors and bettors? A. Well, I have posed as a bookmaker, sir.

Q. Well, I am asking about actual conversations in which there was betting going on. A. An actual one?

Q. Yes. A. Oh, I would say perhaps five or ten in which I was not playing either part, bettor or bookmaker.

Q. I see. And it is out of those five or ten conversations that you state that you have never heard a line being passed between the two bettors; is that correct?

Mr. Farber: I object to that question, your Honor; it assumes a fact not in evidence. Certainly the same information could have been obtained from the times that Mr. Gunn was pretending to be a bettor, because then he would certainly know what a real bookmaker would state.

The Court: I think we have reached the end of
298 your voir dire examination. You may inquire further on cross examination.

Mr. Marks: Well, I would object—

The Court: The objection will be overruled.

Mr. Marks: I forget where we are at this point.

Direct Examination (Continued)

By Mr. Farber:

Q. We were talking about what exhibit, Officer Gunn? What exhibit did you have in front of you? A. We had just finished with February 21st, Exhibit 3.

Q. Exhibit 3. Thank you.

Now, let's go to Exhibit 4. In connection with Exhibit 4 is there any wagering information—any information that was transmitted pertaining to wagering, in your opinion? A. Yes, sir.

Q. What was that information? A. The first part of Exhibit 4 Mr. Katz is apparently getting the line again in his first call.

Mr. Marks: Apparently getting what? I am sorry.

The Witness: Apparently getting the line in his
299 first call.

By Mr. Farber:

Q. Does he ask to receive the line? A. No, he did not. The only thing I can say is that the terminology "Pass, Pass, Pass" is similar to the other calls when he has received the line.

Q. All right. A. The second call that he makes here in which he asks for a Mr. Blabs and identifies himself as Jaffey, there is a discussion as to the payment of money in which Mr. Katz is stating that it is not his money and that the person wanted to know how and where the payment should be made.

The person remarked and said he will mail it air mail special delivery with return receipt requested.

Q. Did I understand you, Officer Gunn, to say that Mr. Katz did not refer to himself as Mr. Katz but by another name? A. He referred to himself as Jaffey.

Q. Is it a common occurrence in wagering with bookmakers for a party that is wagering with bookmakers to have a code name? A. Yes.

Q. Would you continue, please, sir? A. A little later on in the same conversation, the second conver-
300 sation, Mr. Katz states that, "I got a guy playing more money Criff—he takes a nickel in the morning and at 12 o'clock he takes a dime," indicating that it is someone else playing with him who is betting, according to this, five hundred in the morning and a thousand at 12:00 o'clock.

And he closes up on page 3 by saying, "I'll give you a line," but that's about it as far as this date is concerned.

Q. Now, would you take a look at Government's Exhibit No. 5, please, sir, which pertains, I believe, to the date February 24, does it not? A. Yes, sir.

Q. Now, on February 24th were there any bets placed according to the transcript and in your opinion? A. Yes, sir.

Q. And also was there any wagering information transmitted? A. Yes, sir.

Q. Now, would you please tell us what the—let's go first to the bets that were placed. What bets were placed on February 24th? A. The bets are in the second conversation.

Q. What number is called, Miami? A. This is the conversation where the number is called to Miami in
301 which Mr. Katz has again identified himself as Jaffey. He states:

"Give me Temple minus ten and a half for a dime."

He states:

"Pass
"Pass
"Pass
"Pass
"Pass
"Pass
"Give me Duquesne minus 7 for a nickel."

Q. So that would be $1500 so far? A. So far.

Then he states:

"So, I miss calls—I will settle up—so you have a nickel on Temple?"

Which indicates that there was already $500 bet on Temple, which would then make that a $1500 bet that he has on Temple. That is the actual bets that are placed on this day.

Q. Now, was there any wagering information? A. Yes. In the first call to Boston Mr. Katz states—

Mr. Marks: I will object and move to strike that
302 portion.

The Court: On what ground?

Mr. Marks: "The first call to Boston."

By Mr. Farber:

Q. Well, doesn't the transcript refer to Boston? A. Yes, it does.

The Court: The use of the words "call to Boston" is for the purposes of identifying that exhibit and that transaction.

Mr. Marks: I am only objecting to his assuming a fact not in evidence.

The Court: Well, he doesn't know whether it went to Boston or where it went. The only thing is it indicates it went to Boston, and he is using that for identification purposes. I am not fooled by it. If you are not, why, nobody is in trouble.

By Mr. Farber:

Q. Would you continue, Officer Gunn? A. Mr. Katz states:

"Hi ya—Number is—70—right!"

He then states:

"Pass
"Pass
". . . let me call you back in a few minutes."

And he says:

303 "What—the two pro games—What were—Los Angeles and Saint Louis—right.
"Thank you—I'll call you back."

Q. Now, would you take a look at Government's Exhibit No. 6, please, sir?

Now, with respect to Government's Exhibit No. 6, were any bets placed on that date? A. Yes, sir.

Q. And where according to the transcript? A. According to the transcript, the first call was placed to Boston.

Q. All right. Is there a bet placed to Boston? A. There were two bets placed to Boston.

Q. Would you please read us that part of the conversation? A. Mr. Katz states:

"George Washington plus four for a nickel.
"Pass
"Pass
"Citadel—that's six.
"Bet a nickel.
"The schedule will be smaller.
"Okey doke
"Two plays."

Q. Is that the total bets for that day? A. No,
304 sir, that's the total bets on the call to Boston.

Q. Fine. Were there further bets? A. Accord-

ing to the transcript, on the call to Miami Mr. Katz again identified himself as Jaffey. He said:

'I'll buy. I have to take two? Give me Tulsa minus seven—for a dime.

"Pass

"Pass

"Give me Western Virginia.

"Pass

"Pass

"Give me William and Mary—No! Give me Citadel for a dime.

"Listen, I'll tell ya—do you want to give me that Tulsa for another nickel? —Right.

"That's—Tulsa?"

That's the end of the bets on that day.

Q. What is the total amount of the bets for that day including Boston and Miami? A. $1,000 bet on two games in Boston.

Q. Yes.

Mr. Marks: Well, I will move to strike that last portion.

305 The Court: The motion to strike will be denied.

The Witness: On the call to Miami Mr. Katz has $1500 bet on the Tulsa game. He has a $1,000 bet on the Citadel game and an unknown bet on Western Virginia.

By Mr. Farber:

Q. So it would be thirty-five hundred plus? A. Yes.

Q. Now, that is all of the transcript that you had the opportunity to study; is that correct, sir? A. Yes, sir.

Q. Now, you took a look at Government's Exhibit No. 9, did you not, sir? A. Yes, sir.

Q. What is Government's Exhibit No. 9? Let's say Government's Exhibits No. 9, No. 10, No. 11, and let's leave it at those three exhibits for the moment, 9, 10, and 11. A. They appear to be handicap sheets. Most of them are on collegiate basketball teams. I believe there are some on football in here too.

Q. Can you yourself determine what is the code or what is the procedure that was used by Mr. Katz, or is that

306 something that he— A. I don't know what technique Mr. Katz has to figure these out.

Q. From the volume of the records themselves, though, can you determine whether or not it took much time to compile those statistics and figures, Exhibits 9, 10, and 11? That is, if you can tell. A. It would take time to write them. I don't know how much time Mr. Katz would spend to figure these out.

Q. Now, then, I would also like you to take a look, sir, at Government's Exhibit No. 8. Now, sir, could you tell us what is Government's Exhibit No. 8? A. It is a combination line sheet and owe sheet.

Q. What is an owe sheet? A. An owe sheet is a recordation of moneys owed either between a bookmaker and a bettor—and it is one way or the other, owed or to be paid.

Q. Now, would you also take a—what is a line sheet? A. A line sheet is a publication giving the games to be played with boxes to the right in which the betting line can be written in.

Q. Now, would you also take a look, please, sir, at Government's Exhibits 15, 16, and 17? What is Government's Exhibit 15?

307 The witness is looking at Government's Exhibit 15. A. Well, I see "Southern California minus 11" and a "5" after that. This, in my opinion, is a recordation of a wager.

Q. Now, would you take a look at Government's Exhibits 16 and 17? What is Government's Exhibit 16? A. 16 is numerous line sheets with the line written on it. There is also an owe sheet on one of them.

17 contains betting markers and owe sheets.

Q. Now, have you seen Government's 18 prior to this courtroom proceeding? A. Yes, sir, I have.

Q. And are Government's Exhibit 18 for identification merely blowups of Government's Exhibits 16 and 17? A. Yes, they are.

Offer in Evidence

Mr. Farber: Your Honor, for courtroom purposes I move Government's 18 be admitted into evidence so that the expert can then work from them.

Mr. Marks: For what purpose?

Mr. Farber: For court purposes.

Mr. Marks: Not for prosecution purposes?

The Court: For prosecution purposes to aid the prosecutor.

308 They may be admitted.

Mr. Farber: Thank you.

(Documents marked Plaintiff's Exhibit 18 were received in evidence.)

The Court: Mr. Farber, is this your last witness?

Mr. Farber: Yes, your Honor, it will be.

The Court: Well, will the defendant have witnesses?

Mr. Marks: Very few, if any.

The Court: We are not going to finish. We can't very well finish this before 5:00 tonight anyway, can we?

Mr. Marks: I wouldn't put myself on the spot and say I could finish his examination.

The Court: I think we might just as well adjourn then until tomorrow afternoon at 1:30.

Mr. Marks: Afternoon, your Honor?

The Court: Yes. All morning is taken up with the argument on these civil rights cases which we have put over until tomorrow.

They claim it will take all morning. I hope they won't.

Mr. Marks: The afternoon is satisfactory to me.

309 The Court: I have other matters that I would rather devote myself to tomorrow afternoon than this or any extension of it, but I guess we had better finish it.

The matter will be continued, then, until 1:30 tomorrow afternoon.

Mr. Farber: Thank you, your Honor.

(Whereupon, at 4:30 o'clock p.m., Wednesday, May 19, 1965, an adjournment was taken until 1:30 o'clock p.m., Thursday, May 20, 1965.)

312 **Transcript of Court Trial**

Los Angeles, California, Thursday, May 20, 1965. 1:45 P. M.

The Clerk: U.S.A. v. Katz, further court trial.

Mr. Farber: The Government is ready to proceed, your Honor.

The Court: Very well.

Mr. Marks: May I sit at this table while this witness is on?

The Court: All right.

313 JOSEPH A. GUNN,

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Farber:

Q. Mr. Gunn, have you had an opportunity to correlate the line sheets which are in exhibit with the markers which are in exhibit and then correlate both of those types of documents with the transcripts that are in exhibit? A. Yes, sir; I have.

Q. And from your study of the exhibits, have you come to a conclusion with respect to what activity the defendant, Mr. Katz, was engaged in? A. Yes, sir.

Q. And what was that activity? A. Mr. Katz was placing wagers with a bookmaker for another person for a consideration.

Q. Now, on the board in back of you we have Government's Exhibit 18. If you will note in the left-hand corner there is a little number "Pages 1, 2," et cetera, just so that we can delineate on the record which document we are talking about.

Now, will you take a look at pages 1 and 2 and tell us, page 1 is a reproduction of what? A. It's a repro-
314 duction of a betting marker and an owe sheet.

Q. Now, is there a correlation between page 1 and page 2? A. Yes, sir; there is.

Q. What is that correlation? Would you point it out, please? A. On the top of page 1 where there is a $1500 bet on Temple minus 10½ points. On the top of page 2 the No. 2 team is Temple, the line spread is 10½ points. To the right of that is circled the numeral 15.

Below Temple is Duquesne and there is a thousand dollar bet on Duquesne minus 7 points.

No. 14 on page 2 is Duquesne. The line is 7 points, and a 10 is circled.

Notre Dame is a thousand dollar bet on Notre Dame minus 1 point.

No. 5 on page 2, Notre Dame, the point spread is 1 point, and there is a 10 to the right of that.

Q. Now, without going into all the detail, would you take a look at the two bottom documents which are now marked as page 3, page 4 and page 5? Again, is there a correlation between page 3 and pages 4 and 5? A. Yes, sir; there is.

Q. And is it the same type of correlation as you
315 have just gone through with respect to pages 1 and 2? A. Yes, sir.

Q. Now, would you tell us how you determined from these documents that Mr. Katz was actually betting for consideration for another? A. Using the documents and also parts of the transcript where Mr. Katz states that he only has one or two dollars of the action, on Temple minus 10½, to the left of that is the figure 15 which stands for $1500 which correlates with the transcript, a $1500 bet on Temple.

To the left of that is the numeral 10. In my opinion the 10 stands for the player that Mr. Katz is betting for as part of this $1500 bet.

Mr. Katz would have five hundred, the player would have ten hundred.

Duquesne to the left of that is a thousand dollar bet. The numeral 10. To the left of that is the numeral 8. This would be the player's portion of the bet, $800. Mr. Katz would have $200.

Likewise for Notre Dame.

Now, I compared the marker with the line sheet, the final scores. Temple did win. They collected $1500, which is shown to the right.

Duquesne did win. They collected a thousand dollars, which is shown to the right.

316 Notre Dame lost. To the right of that is minus $1100 which is what they would have to put up, the vigorish, to win a thousand dollars.

This gives a total of $2500 won minus $1100 lost, leaving a total of $1400 net.

The players' share of the winnings would be $1400, Mr. Katz' share would be—correction. $1400 net. The play-

ers' share would be $920, and Mr. Katz' share would be $480.

Q. Now, would you look at page 8, please. That is the final page. It is up there in the left-hand corner of the easel.

Have you compared page 8 with transcript of conversation? A. Yes, sir; I have.

Q. And do you find the bets that are recorded on page 8 mentioned in the transcript? A. Yes. Most of it is similar.

Q. Could you be specific, please, sir? A. In the transcript Mr. Katz has bet $500 on George Washington and he has plus 4 points. No. 6 of the—of the exhibit shows George Washington. The point spread is puls 4.

To the right of that is written a 5 for the $500. Now there is also a plus 4½ and a 10 circled which would
317 indicate a thousand dollar bet, however, we do not show that in the transcript.

Mr. Katz on the first telephone call under this date also has bet $500 on the Citadel, that is circled. There is a 5 to the right of that.

On the second telephone call on this date Mr. Katz has bet $1500 on Tulsa with a minus 7-point spread.

No. 4 on the exhibit is Tulsa. The point spread on that shows 17, which indicates that there is an error in the transcript. There is a 15 circled for the $1500 bet. In the transcript he is also placing a wager on Western Virginia, however, there is no mention in the transcript of the amount of the wager.

Q. But do we see this West Virginia— A. There is West Virginia on the board, No. 5. It is the team playing George Washington.

That is the correlation between the transcript and the exhibit.

Mr. Farber: Thank you. I have nothing further of this witness, your Honor.

Cross Examination

By. Mr. Marks:

Q. Mr. Gunn—Officer Gunn, refreshing my recollection, how long have you been on the Vice Squad? A. I worked

Los Angeles Vice for 20 months and I have been
318 in Administrative Vice since August of 1963.

Q. Does that deal primarily—your work, has it dealt primarily with bookmaking? A. Yes, sir.

Q. And the experience that you have accumulated, has that come out of the reading of any books or being actually in the field and arresting bookmakers? A. It comes out of receiving formal training at the Vice School; also receiving training from more experienced officers when I first started Vice; also from conversations that I have had with bookmakers, bettors, agents, service operators.

Q. Now, let's talk about this nickel system. What is your definition? A. A nickel system?

Q. Yes. A. It's a method where to bet a nickel would mean $500, to bet a dime means a thousand dollars.

Also, in a recording on the nickel system the two figures to the right of the decimal point are omitted.

Q. Now, is there any reason why—strike that.

Isn't it a fact that the nickel system of betting is merely a multiple of whatever the bettor chooses to use as a multiple? In other words, a nickel may be $50, $500
319 or 5,000? A. The only term I have ever heard for a nickel is $500. That's the only expression that I have ever heard of.

Q. If there is another system whereby a nickel would be $50, you wouldn't know about it? A. I don't know about it, no.

Q. And if a nickel were $50, then there would be a different analysis as far as you are concerned as to the amounts bet and the amounts earned—or won; is that correct? A. If it were earned, yes.

Q. Or if it were $5,000 it would be five times more than what you expressed here? A. If it were earned, yes.

Q. Now, what in these figures give you—upon what do you base your expert opinion that the figure 15—let's take page No. 1. I assume that's the upper right-hand corner. The 10 on the left is a thousand? A. Using the same series of numbers I know on this date Mr. Katz has bet $1500—

Q. How do you know that? A. —on Temple.
From the transcript.

Q. What portion of the transcript states a bet of
320 $1500 on— A. It says a nickel and a dime.

Q. In other words, you are extrapolating that when he says a nickel it means $500? A. That's correct.

Q. And when he says a dime he means a thousand, so, therefore, fifteen? A. Yes, sir.

Q. Now, if you did not have the transcript in front of you would you be able to make the same interpretation? A. Without the transcript I could not say how much is wagered, and I also could not say what part of that bet is the player's and what part is Mr. Katz'.

Q. Now, what in the transcript or any of the documents lead you to believe or form the conclusion that the figures 10, 8 and 8 are Mr. Katz' or anybody else's portion of the wager? A. In the transcript Mr. Katz states that he is betting the money for someone else, that he only has a small piece of it, so—

Q. Well, in the transcript are you talking about the transcript that relates to this bet? A. No. One of the other transcripts in which he is referring to a claim, I believe.

Q. In other words, you are hypothesizing that because in one instance he made a bet for somebody else that
321 these papers represent his participation in these bets? A. That and also from the testimony of one of the other agents.

Q. What testimony was that? A. I believe Mr. Donovan—Mr. Frei testified that he overheard through the apartment house one of the gentlemen in the room with Mr. Katz—I believe the statement was 1440 is what the total amount was then. I believe the guy says, "Well, how do I stand?" And Mr. Katz said, "1440."

I then came to the one sheet here and I found the figure 1440, and I also find the figure 320, which I added up here (indicating), the total of that day's action, and I found the 320 to be the player's share and also the 1440 to be the player's share.

Q. You mean that's your handwriting on the right side of that sheet? A. No, sir. I added the action up that was bet on this day.

Q. I see. A. And they both appear in the same column which would indicate that that is the player's column.

Q. Now, in all of these—you testified that in your opinion Mr. Katz was placing wagers for another person
322 for a consideration. A. Yes, sir.

Q. And in addition to that he was placing wagers for himself; is that correct? A. Well, in the sense of the word, if he has a piece of the bet, the bet is for himself and another person.

Q. Well, what is the consideration that Mr. Katz receives for betting for another person? A. On a thousand dollar bet he is getting $200 of it.

Q. Unless he is betting $200 himself? A. That's correct.

Q. Then he is doing it without consideration? A. No. He is getting the consideration because probably without this player Mr. Katz would not be able to call this bookmaker to bet a thousand dollars.

Q. Well, this is—again you are assuming something? A. Well, I am assuming it, yes.

Q. Yes. A. The consideration is that Mr. Katz is able to bet higher amounts of money.

Q. All right. Now, you also stated that it was your opinion that Mr. Katz was betting with a bookmaker because of this vigorish or percentage that the bookmaker takes. A. That and the line.

Q. And what? A. And the extent of the line that he has received.

323 Q. Well, you don't know what the line is that he has received, do you? A. I know in the transcript he has received numerous lines for numerous games on one day.

Q. Well, that's your assumption. You didn't hear the other side of the conversation, did you? A. No. But I can hear Mr. Katz reading the line back and making the statement, "Give me the line. I will read it to you back."

Q. In one transcript? A. Yes.

Q. In one day's conversation? A. Yes.

Q. When Mr. Katz says, "Pass" on a transcript, what does that mean? A. Again it is an assumption because I don't hear the other side, but I would imagine that the person on the other side is reading the line down and Mr. Katz is saying, "Pass, pass." He is not interested in that game or he is not going to bet that game.

Q. Now, by the way, have you ever testified in federal courts under an indictment brought under Section 1084 of Title 18? A. This is my first appearance in federal court, sir.

Q. Now, from the reading of the transcript, my
324 understanding is that it is your opinion that somebody on the other end of the line was telling Mr. Katz about the betting line. A. That's correct.

Q. And on occasion Mr. Katz would place a bet on a particular game? A. Yes, sir.

Q. Now, that's the majority of the transcripts; is that correct? A. I wouldn't say it is the majority of the transcripts. There is quite a bit of conversation on the transcripts.

Q. Well, look at the February 23rd transcript. I am sorry. The February 19th transcript.

Mr. Farber: That would be Exhibit 1, counsel.

Mr. Marks: Exhibit 1.

Q. That's six pages? A. Yes, sir.

Q. And would you agree that the majority of that transcript discusses a bet or a wager which had already been made? A. Yes, sir.

Q. It was not placed on the 19th? A. No, sir.

Q. Can you tell from that transcript or reading at
325 what time that bet or wager had been placed? A. Only that it was in the past.

Q. All right. And was there any information contained in this transcript about that bet or wager other than the fact that there had been a bet or wager and some disagreement on the bet? A. No. As to what type of bet or what was bet I can't tell.

Q. Now, aside from his placing a bet could you find anything in any of the transcripts in which Mr. Katz told the other person at the end of the line, gave him any betting information other than the placing of the bet? A. Well, there are occasions when he says, "I will read the line back to you," and repeats it. And there is also—

Q. Well, that's a clarification? A. Yes. There is also on February 19th after several phone calls he again calls Boston and tells the person on the other line the credit arrangements that have been made between him and someone named Elliott.

Q. Well, that is a statement, if I am reading correct from page 5— A. Yes.

Q. —"Hello? Listen—I just spoke to Elliott— He gave me, an extension oh good he will give me credit for
326 eleven and I can owe twenty—" A. Yes.

Q. This is also information in your expert opinion regarding a past wager? A. Past wager.

Q. Something that's already been done? A. Well, also—it will also be information as to the credit arrangements for the future.

Q. Well, what credit arrangements does that give for the future? A. Well, not hearing the other end of the transcript I'd have to be making an assumption.

Q. Well, when he said, "He gave me"—

Mr. Farber: Excuse me, counsel. Your Honor, may the witness be permitted to finish his answer?

The Court: I assumed he finished.

Mr. Farber: Oh.

The Court: Did you finish your answer?

The Witness: Well—

Mr. Farber: I am sorry.

By Mr. Marks:

Q. When there is a statement, "He gave me, an extension," does that indicate to you in your expert opinion that there was some money owed and an extension of
327 that money owed was given? A. That part of it, yes.

Q. All right. And you don't tie that into the rest of the statement, "oh good he will give me credit for eleven and I can owe twenty"? A. The part "and I can owe twenty" to me means that this is the credit arrangement for the future now starting with this moment.

Q. Does it have, anything to do with information about a game or a particular game? A. It has to do with information about wagering.

Q. It has to do with information about his personal credit line? A. That's right; which is a necessary part of the relationship with a bookmaker.

Q. If it is a bookmaker? A. I feel confident it is.

Q. Now, you, I believe, stated that the reason that it was a bookmaker was because the Duquesne game they

lost and they had to pay $1100? A. That was an error on my part yesterday, counselor. I meant the Notre Dame game.

Q. Because in fact Duquesne won? A. Duquesne won, yes.

Q. Now, what does a dollar mean? A. A dollar?
328 Q. Yes. A. One hundred dollars.
Q. In your opinion? A. In my opinion.

Q. It could mean also a dollar?

Mr. Farber: Your Honor, that's quarreling with the witness.

Mr. Marks: Let me ask you this—

The Court: Overruled.

The Witness: I would say then in this particular case, no, it does not mean a dollar.

By Mr. Marks:

Q. Well, the only reason you would say that is because you have reached the conclusion that Mr. Katz was playing the nickel system? A. That's correct.

Q. The nickel system where a nickel is $500? A. Yes, sir.

Q. Therefore, in that system of shorthand as you know it a nickel means $500 but a dollar is $100? A. That's right.

Q. So there would be five dollars to a nickel? A. I have never heard it put that way, counselor.

Q. Well, that's the way you would calculated it,
329 wouldn't you? A. No. I am only calculating on the particular conversation that Mr. Katz had in which he states that he only have one or two dollars of the action. In that particular sentence it is my opinion that he means one hundred or two hundred dollars worth of the action.

Q. Now, these particular—I don't know how to describe—what do you call the blown-up page 2? A. Part of the line sheet.

Q. Where do these line sheets appear? A. Where do they appear?

Q. Yes. A. You mean locally?

Q. Yes. A. I understand this particular line sheet is made by Jerry Kilgore, Santa Monica Boulevard in West Los Angeles.

Q. It is something that's printed up? A. Yes; it's a publication.

Q. That's what I am talking about. Is it a magazine or a daily sheet? A. It's an information publication on sporting events.

Q. And you can buy it any place? A. Not every place, no.

Q. Well, it's for sale openly on newsstands if they
330 care to sell it? A. Yes, sir.

Q. Does that go for every—I am sorry. 1, 2, 3—3, 5 and 6, if I have got to counting right— A. 3 is this, sir (indicating). It goes for the four sheets to the left of the blackboard.

Q. All right.

Mr. Farber: Which, for the record, are pages 4, 5 and 8, counsel?

Mr. Marks: Well, I don't understand the page reference, your Honor.

Mr. Farber: On the bottom left-hand corner there is a page reference just so that in Exhibit 18 we'll know which page we are talking about when the record is read.

Mr. Marks: Oh.

Q. And the written notations there are, as you interpret, some sort of handwritten notations—I mean, shorthand notations? A. Shorthand? I wouldn't say they are shorthand.

Q. Well, the 10 means a thousand. That's sort of a shorthand notation, isn't it? A. Not in the system that Mr. Katz uses. It is a common way of writing it.

Q. Well, it's a shorthand notation in the ordinary— A. It's abbreviated.

Q. Abbreviated shorthand using a colloquial ex-
331 pression. And the other writings are—contain what, the games that are—the results of the games? A. To the right of the 15, you mean?

Q. Yes. A. I am not quite sure I know—

Q. Well, in general, the writing on there—on the sheet— A. In general, it's an owe sheet.

Q. Which sheet are we talking about now? A. Are you talking about these two (indicating)?

Q. Well, let's talk about those two, then. A. All right.

Q. Those are what you call owe sheets? A. No. One of

them is a recordation of a bet and an owe sheet, and the other is a betting marker and an owe sheet.

Q. Which is the recordation of the bet and the owe sheet? A. This is the recordation of a bet and an owe sheet, page 3.

Q. What bet is that? A. There are four bets: Maryland, Oklahoma City, Oklahoma State and Villanova.

Q. And do those bets—do you know who made
332 those bets? A. I only know that the paper was found in the possession of Mr. Katz. I don't know who actually placed the bets.

Q. So in bookmaking parlance it's called an owe sheet when it records what somebody owes is owed; is that correct? A. That's correct. That is not what I have just related there.

Q. No. I am talking about below that. A. Below that, yes.

Q. In other words, it's like a business ledger? A. That's correct.

Q. Now, have you ever seen a business ledger? A. Yes.

Q. Would you refer to a credit and debit account or accountability and accounts receivable—accounts receivable and accounts payable as owe sheets? A. No.

Mr. Farber: Irrelevant. Pardon me. Irrelevant and immaterial, your Honor.

The Court: Overruled.

Mr. Farber: Thank you.

The Witness: No, sir.

By Mr. Marks:

Q. So it is only when you are dealing in the area of betting and wagering and bookmaking that you call
333 these an owe sheet? A. Well, let me put it this way, counselor. Whenever I have figures like this on the same piece of paper as the betting marker, I call it an owe sheet.

Q. What is a betting marker? A. A betting marker is a recordation of the wager.

Q. Regardless of who made the wager? A. That is correct. Now, this piece of paper here—

Q. A notation that a bet was made somewhere at some time? A. Well, this particular piece of paper I don't call a betting marker, I call it a recordation of a wager.

Q. How about the one on top? A. The one on top I call a betting marker.

Q. Why? What is the difference? A. Well, the difference is that I have a transcript which verifies those bets, therefore, the identification of the bets need not appear on the piece of paper.

On the bottom piece of paper I don't have any transcript which would verify that these bets were made, there was no identification on them, so I would say it is merely a recordation of a wager.

Q. Then the difference between a betting marker and a recordation of a wager is that you know who placed
334 the bet? A. Well, it's not that you know but there is some indication of an identification of a bettor.

Q. And the identification here is the fact that it was found with Mr. Katz and you heard the transcript? A. Not that it was found with Mr. Katz but that I read the transcript and the transcript correlates with the bets.

Q. All right.

Excuse me. May I withdraw that, your Honor?

The Court: Withdraw what?

Mr. Marks: The "All right."

The Court: I didn't even hear it. It may be expunged from the record.

By Mr. Marks:

Q. Now, Mr. Katz—you have reviewed all of the transcripts and you have been sitting here during the course of this trial; is that correct? A. Yes, sir.

Q. And you have—

The Court: I think the record should show that his name is not Mr. Katz.

Mr. Marks: No. I meant now comma Mr.— I am speaking of Mr. Katz.

The Witness: Yes.

335 By Mr. Marks:

Q. You heard the testimony? A. Yes, sir.

Q. Relating to Mr. Katz? A. Yes, sir.

Q. And you heard the testimony that Mr. Katz made that he was a handicapper? A. Yes, sir.

Q. Well, now, is there a distinction in your mind between a handicapper and a bettor? A. Well, most handicappers are bettors.

Q. Is there a distinction in your mind between a handicapper and a bettor? A. One could be both at the same time. I don't know what you mean by a distinction between.

Q. A bettor, unless he just flips a coin as to what person is—I want to see the yellow sheets.

The Clerk: Oh. I am sorry.

Mr. Farber: Counsel, if it will assist you or aid you at all we will be glad to stipulate that Mr. Katz was a handicapper.

By Mr. Marks:

Q. You will agree with me that a person could be a handicapper and not a bettor? A. Yes, sir.

336 Q. At the same time a person who bets, unless he bets by just flipping a coin or sticking a pin into the game he that wants, is always a handicapper in some sense? A. Yes, sir.

Q. Now, have you ever had a chance in your experience as an expert to review sheets of paper made up by a professional handicapper? A. Yes, sir.

Q. I will ask you to look at Exhibits 10 and 11—9, 10 and 11 and tell me in your professional opinion what those exhibits are? A. They are handicap sheets.

Q. What is a handicap sheet? A. Mr. Katz is rating teams as to their performance by some kind of code.

Q. Now, you can't read the code? A. No, sir.

Q. Can you estimate how many sheets of paper there are in those three exhibits? A. Several hundred, I imagine.

Q. On any of those several hundred sheets of paper do you find any evidence of a recordation of a bet or a wager? A. The ones that I went through I found none.

Q. Now, you are familiar with horse racing? A. Yes, sir.

337 Q. You are familiar with these (indicating)? A. Line—

Q. What do you call these, line sheets? A. Yes, sir.

Q. Now, the line is the opening odds or the odds on a particular team or teams; is that correct? A. It's the betting odds.

Q. The chance that is given by professionals as to whether or not a team will win or lose? A. That's correct.

Q. Is that about it? A. It's a fair statement.

Q. And would the same thing apply to horse racing, there is an opening line on horses, newspapers print them? A. It is slightly different, counselor.

Q. Well, if I open up tonight's paper—today's paper I will see a handicapper's—somebody handicapping the horses for the next day's race? A. True. But this horse racing—horses are handicapped by weight. The odds are determined by the betting at the track.

Q. Well, there are odds which change after the betting commences? A. That's right.

Q. But there is an opening line, isn't there?

338 A. In someone's opinion, yes.

Q. As a matter of fact, the newspapers hire somebody to handicap these horses and make the opening line for them? A. Yes, sir.

Q. It is not standard, is it? One newspaper's handicapper may rate a horse differently? A. Yes, sir.

Q. Is that correct? A. That's correct.

Q. And the same thing applies for lines and handicapping on the other sporting events, there is a professional handicapper? A. Not locally.

Q. Well, are there such things as professional handicappers who get paid because of their special skill in being able to select teams that are going to win— A. Yes, sir.

Q. —football games? A. Football and basketball, yes. But locally baseball, no, as far as—I take it we are still on the discussion as appearing in the newspapers?

Q. General sporting events. A. Yes.

Q. All right. So from these papers alone, the yellow sheets, Exhibits 9, 10 and 11, can you tell anything

339 more than that Mr. Katz is a professional handicapper? A. From these papers alone (indicating), no.

Q. Would you in your professional opinion if you saw only those Exhibits 9, 10 and 11 be able to state in your professional opinion that Mr. Katz was a professional handicapper?

Mr. Farber: Object to the question in that it assumes a fact not in evidence that this witness has seen other papers.

The Court: Overruled.

Mr. Farber: Thank you, your Honor.

The Witness: What was I—I didn't hear the last word.

By Mr. Marks:

Q. That he was a professional handicapper. A. That would be the only thing that I could reach a decision on just from reviewing these papers (indicating).

Q. From reviewing those three papers? A. Yes.

Q. And the other evidence you have shows that although he may be also a bettor, as far as you can determine, he is also a professional handicapper? A. From those sheets (indicating)?

Q. Yes. From the sheets and from the transcripts.

A. I can tell he is a handicapper from this
340 (indicating).

Q. All right. A. Now, I don't know if I can tell if he is a professional handicapper from those (indicating) alone.

Q. Now, being a professional handicapper, nevertheless you have not found any information on any of the exhibits or the transcripts that Mr. Katz gave any professional handicapper advice to any person on the phone; in other words, the line, the odds or anything except place a bet; is that correct? A. I don't believe I understand the question. I am sorry.

Q. Well, assume that Mr. Katz was working for a bookmaker. A. Yes.

Q. Bookmakers have to make their own lines, don't they? A. No, sir.

Q. Well, they have to get their line from somebody in order to give or take the odds, don't they? A. They buy a line and make adjustments.

Q. Now, there is nothing on the transcripts that you have that indicate that Mr. Katz was hired by any bookmakers—they weren't buying any line from Mr. Katz? A. None that I could see.

341 Q. All right. To get it perfectly clear, Mr. Katz in these transcripts in your opinion discussed a past wager; is that correct? A. On one occasion, yes.

Q. On the other occasions he was listening to the line being given to him and made some bets? A. Yes.

Q. Is that correct? A. Yes.

Q. And in one other occasion he read the line back as a verification of what he had already received? A. Yes, sir.

Q. That is about the extent of these conversations, have I fairly put them? A. Outside of the mention that the bet is not here, he is betting somebody else's money.

Q. Well, that was a past bet again, wasn't it? A. No. He is referring to his betting as it is now.

Q. Would you show me that portion? A. Yes, sir. Bottom of page 2 on the first conversation on February 19th he states, "This isn't my business—you know my play—I take a piece at a dollar or two—" To me this does not refer only to the past, it refers to the present and the future.

Q. But he was talking about that past debt?

342 A. No. I believe in this phrase of the conversation he is talking about his current business.

Q. All right. We won't argue about interpretation.

But you will agree that he was, in the course of his conversation at page 2, talking about setting right—what would you call it? adjustment of a bet which had been made? A. That was the general trend of the conversation, yes.

Q. Right. And somewhere along the line he offered this explanation apparently that "You know my business is to take a dollar"; is that correct? A. That's correct.

Q. So would you agree that this was an explanation of why he was even interfering with this bet even— A. I'd say it's an explanation of why he was concerned about this bet.

Q. All right. Excuse me, your Honor. May I have a moment?

Which exhibit is this from, counsel?

Mr. Farber: What is that?

The Court: 19.

The Clerk: 18.

Mr. Marks: May I see 18?

Mr. Farber: Excuse me. Are you asking him

343 what exhibit was used to reproduce Exhibit 18?

Mr. Marks: Yes. I just want the exhibit pages from the reproduction.

Mr. Farber: That would be 17 and 16, I believe.

Mr. Marks: I am getting fouled up with the exhibits. I guess all of this is mine.

Q. Now, I will show you Exhibits 16 and 17. Let's take for identification this blown-up document that says week ending Sunday, February— A. Yes.

Q. —it's from Exhibit 17. On Exhibit 17, which doesn't show on the blow-up, some of the notations are in red and some of the notations are in pencil. What is your explanation for that? A. Almost all the notations in red are the scores of the games.

Q. On Exhibit 16 there are notations in red. Now, does Exhibit 16 compare with anything else? A. Well, Exhibit 16 are these two right here (indicating). I don't know.

Q. In your professional opinion can you place any significance on something being written in red pencil or in plain pencil? A. No, sir.

344 Q. You don't know what it means? A. I don't know what it means. I don't know what the significance of using red ink is.

Q. That's what I mean, you don't know why— A. No, I don't know why he uses red ink.

Q. In your professional opinion or experience have you ever been acquainted with the fact that a handicapper might use red ink or red pencil rather than black ink or black pencil? A. No, sir. I don't know.

Q. You never heard of it? A. No, sir.

Mr. Marks: Excuse me. I believe that's all on cross.

Redirect Examination

By Mr. Farber:

Q. Now, Mr. Gunn, just a few questions. You were asked by defense counsel to direct your attention solely to Exhibits 9, 10 and 11 which were handicap sheets. But, now, considering all of the exhibits in front of you, is Mr. Katz' business merely that of a handicapper in your opinion?

Mr. Marks: Your Honor, I will object to that question as being beyond the scope of this man's expertise.

The Court: Well, he has already testified to it. I think he may testify to it. But he has also done so on

345 direct examination.

Mr. Farber: Fine, your Honor. If it's been—if the court feels it's been covered, then I don't wish to ask the question again.

Q. Now, directing your attention to Exhibit 4 which is a transcript of conversation on February 23rd, would you look through page 2 of that exhibit?

Now, using page 2, do you find again any number of references to the fact that Mr. Katz is betting for another person? A. Yes, sir.

Q. Now, would you read those references? A. In the first paragraph on page 2 Mr. Katz states:

"Well, Mac it is not my money, you know that?"

Q. And then would you read the next sentence, too? A. In the second paragraph—

Mr. Marks: I am sorry. What page is that on?

Mr. Farber: Page 2 of Exhibit 4.

The Witness: Page 2.

Mr. Marks: Page 2.

By Mr. Farber:

Q. The next sentence, if you would, please. A. In the second paragraph Mr. Katz states:

"I got a guy playing more money Criff—he takes a nickel in the morning and at 12 o'clock he
346 takes a dime—"

Q. Now, would you go back to the first paragraph you were reading, sir? A. Yes, sir.

Q. And after the sentence that you previously read in the first paragraph, that is, "Well, Mac it is not my money, you know that?" Would you read the next sentence? A. "So, I want to tell you—that he said he will mail it Air Mail Special Delivery with return receipt requested."

Q. Thank you. So, then, besides the 21st there are additional comments pertaining to betting for others? A. Yes, sir.

Mr. Farber: I have nothing further. May this witness be excused, your Honor?

Is there further recross?

The Court: We don't know yet. May this witness be excused?

Mr. Marks: I have no objection.

The Court; You may step down.

Mr. Farber: Your Honor, I want to be sure I have my exhibits in evidence. Do we have Exhibits 1 through—

The Clerk: 1 through 18 are in evidence.

Mr. Farber: 19 and 21, I think it is.

The Clerk: 19—that is right. 20 is omitted.

346a Mr. Farber: Your Honor, at this time the Government rests.

The Court: We will take our afternoon recess at this time.

Mr. Marks: I just think the clerk better check his records because there is one exhibit that he missed which is not in evidence. I hate to put the Government at a disadvantage.

The Court: Yes. I am glad you are looking out for the Government's interests.

Mr. Marks: Tht would be Exhibit 7.

The Clerk: Exhibit 7 is in evidence. 7-A through 7-K.

Mr. Marks: These were the business records of the telephone company.

The Clerk: Witness Cunningham.

Mr. Marks: The Government asked to have them introduced and the Grand Jury came in. I wanted to make an objection, and when we returned from the Grand Jury—

Mr. Farber: If they are not in—

The Clerk: They are in and I show them in my minutes of yesterday.

The Court: Well, they will have to—do you wish to make an objection?

Mr. Marks: Yes, your Honor.

347 The Court: Very well. You may make your objection now.

Mr. Marks: The objection to the records being introduced in evidence is it is apparent from the testimony of Mrs. Cunningham that the facts of the calls themselves, they are not the best evidence of the facts of the calls themselves because the telephone operations are the ones who make the calls and place notations on the business records of the telephone company. Therefore, the statement that the calls were made by Mrs. Cunningham or by the telephone records are in fact hearsay.

The Court: Well, the records are introduced as business records. It is your contention that there are business records which are better evidence, or that the testimony of the operators who placed the calls would be the best evidence.

Mr. Marks: That's my contention, your Honor.

The Court: Well, the objection will be overruled. These have been introduced as business records and they, as such, I think, are proper.

(The exhibits marked Plaintiff's Exhibits 7-A through 7-K were received in evidence.)

Mr. Marks: Does the Government rest?
The Court: They do.

Government Rests

Mr. Farber: The Government rests.
348 The Court: Do you wish to have a recess at this time?
Mr. Marks: Fine.
The Court: We will take our afternoon recess at this time.

(Recess taken.)

Defendant's Motion To Strike Exhibits 1 Through 6 and Denial Thereof

Mr. Marks: Your Honor, may I make a motion?
The Court: Yes.
Mr. Marks: The motion is to strike from the record Exhibits 1 through 7—I am sorry—1 through 6 being the transcripts and all testimony relating to conversations had between Mr. Katz and any agent of the FBI on the ground that prior to the admission of these statements or the transcriptions there was no corpus delicti of the offense established.
The Court: That prior to the statements—you mean to the evidence—prior to the introduction of the evidence there wasn't any proof—
Mr. Marks: Looking at it now.
The Court: There has been no establishment of the corpus delicti?
Mr. Marks: And as of the time these statements were made or introduced in evidence, even assuming that the future evidence related in some way to them, there was still and still is no corpus delicti sufficient to admit
349 these statements in evidence.
The Court: Well, I take it if the evidence at this time establishes that there is a corpus delicti by proof other

than the mere admissions, if they be such, of the defendant, that nevertheless that is sufficient. The difficulty here is that some of the statements made by the defendant himself are the very acts—or, at least acts themselves which are evidence of the corpus delicti.

Mr. Marks: May I be heard on that, your Honor?

The Court: Yes.

Mr. Marks: My understanding of the corpus delicti of this statute as I read it and as set forth in the Government's trial memorandum is that you have to have the following three elements:

1. A person engaged in the business of betting or wagering;

2. A transmission of wagering or betting information;

3. Over interstate lines.

No. 4 which may or may not be an element of the corpus delicti, and I am not certain about that, is whether or not the person transmitting the call was calling from a state in which that betting was legal to another state where that betting was legal, or assuming the opposite, that it wasn't legal in the state from which he was calling.

350 I don't know whether that's a question of the corpus delicti or a question of evidence. But it is something for the moment that is not a part of the corpus delicti.

The first three elements, I submit, are not satisfied; that the first element, that is the person is in the business of betting or wagering is not satisfied by evidence of the fact that he placed a wager or a series of wagers, and that he placed them over interstate channels of communications. And no where do I find in any of the testimony here any evidence that this person, the defendant, was in the business of betting or wagering.

There is no such evidence that that was his business. On that basis—

The Court: Of course, that's a conclusion, a legal conclusion which the court is required to make, I take it, from the evidence if there be evidence upon which such a conclusion could be based. We have a lot of documentary evidence, irrespective of who prepared it or where it came from, which seems to me to appear to be, at least for the purposes of a prima facie case, documents and paraphernalia of one so engaged.

I think that satisfies the prima facie case of the corpus delicti and also of the offense.

Mr. Marks: I will submit it, your Honor.

The Court: So the motion to strike will be denied.

351 The Government has rested.

Mr. Farber: The Government has rested, your Honor.

Mr. Marks: I thought the Government always had the chance to argue first, your Honor.

The Clerk: Are you resting?

Defense Rests

Mr. Marks: The defense rests. I am sorry. I thought that was—

The Court: You may proceed.

Mr. Farber: Thank you, your Honor.

Argument on Behalf of the Plaintiff

Mr. Farber: Your Honor, in this case we respectfully submit that the evidence as represented by the exhibits and the testimony of the expert establishes, 1, that calls were placed in interstate commerce between both Los Angeles and two cities, Boston, Massachusetts, and Miami.

The exhibits which back up this statement, of course, are Exhibits 1 through 6, the transcripts, wherein we actually have a transcription of Mr. Katz telling the operator, "I want Boston, Massachusetts," such-and-such a number, or "I want Miami," such-and-such a number.

Then we have Exhibit 7 which are the exhibits of the telephone company. They dovetail in with the transcriptions. Those business records of the telephone company also, as Mrs. Cuningham testified from the stand, indicate the calls were placed to either Boston or Miami.

352 Now, the second element is were there bets placed?

We have the testimony of the expert. I think I will just take one transcription, Exhibit 6, for demonstration purposes.

The testimony of the expert is that, yes, indeed, on certain occasions there were bets placed.

It is pretty obvious that he is correct if we look at the transcriptions. For instance, on Exhibit 6 on the first page there is the comment by Mr. Katz, "Bet a nickel." And

once we know what the nickel system is as explained by the expert, it is obvious that there were wagers being placed.

In addition, on every occasion, if I am not mistaken, the defendant Katz caused the line to be read to him by asking for it. He asked for the line. The person in Miami read it to him.

In addition, on the 19th Mr. Katz further gave information to, I believe it was, Boston when he set up information to establish his credit line for future betting.

So, indeed, there was both in this case transmission of wagers as charged in the indictment and transmission of information in assisting in the business of wagering.

Now, finally, the third element that remained is was Mr. Katz in the business of wagering? What evidence do we have to that effect? A. Well, No. 1, we have his handicap sheets. They are quite voluminous. They indicate
353 that he was a handicapper.

We then have above and beyond that the owe sheets which were taken from his person, the line sheets which are recordations of wagers showing that he used these handicap sheets for his own purposes, that is, betting.

We have the testimony of the expert who says from the line sheet, from the owe sheets, and from the conversations —because, of course, they are very important on each date—we can tell that Mr. Katz is involved not only in handicapping but actually in betting; that he was able to tell that because Mr. Katz was a professional bettor. He bet for others for consideration.

Finally, and certainly not to be overlooked, is Mr. Katz' admission on not one but two occasions, once to Mr. Leo LaRue of the Federal Bureau of Investigation, and on the second occasion to Mr. Donovan of the Federal Bureau of Investigation, at which times, on separate days, Mr. Katz admitted he was in the business of handicapping and betting.

As a matter of fact, I think it was to Mr. Donovan that he went so far as to say, "If you give my records back I will be betting tomorrow." So clearly that is Mr. Katz' business.

He was engaged in the business of wagering. He used the interstate wire facilities, and he placed wagers to the

two cities mentioned, plus also giving information
354 and causing information to be transmitted in connection with the business of wagering.

Argument on Behalf of the Defendant

Mr. Marks: If the court please, I think the issues that we deal with here are, No. 1, the interpretation of a criminal statute. We have to start interpreting these statutes, I believe, quite strictly.

And the authorities for that are cited in the memorandum of points and authorities in support of the motion to dismiss.

The evidence here—the question—as I say, we are dealing now with a very peculiar statute which has no definitions in it which states that in the first place to be guilty of this offense a person engaged in the business of betting or wagering must do certain things in interstate commerce.

No. 1, he either must place a bet or he must assist in the transmission of information concerning betting or wagering.

Now, I am trying to think of the case, and perhaps it is cited. It dealt with, I believe, 1952—Section 1952. That's U. S. v. Bergland, which is a 318 F. 2d 159 case, where they talk about whether or not the past-posting applied in situations quite similar. That was information about a
past-posting bet. The question was, I believe,
355 whether or not this was wagering information. My recollection—Mr. Farber can correct me if I am wrong—is that this was not betting or wagering information as that statute was to be construed because you assume it is going to be on a wager which has already—which is ready to be transmitted.

Now, if we take the transcription of February 19, 1965, the primary conversation of Mr. Katz dealt with a wager which had already been placed and there was an attempt to settle it. Using a strict construction of the statute, this transmission of information was not a transmission or assisting in the transmission of wagering information whatsoever.

There is a question as to the statement, "He gave me, an extension oh good he will give me credit for eleven and I can owe twenty," as to whether or not this is wagering

information or talking about credit. But if you apply the strict standard of definition and give the benefit of doubt to the defendant, it must be seen that this is also not assisting in the transmission of wagering information.

Now, as I understand the reading of the statute, and we are going to read it from the defense standpoint to interpret what Congress meant, the person who is betting or on one end of the line must transmit wagering information or assist in transmitting wagering information. So a great deal of the transcripts deal with not his, Mr. Katz
356 assisting in transmitting wagering information, but in receiving wagering information.

Because the way the statute reads it, is "knowingly using—uses a wire communication facility for the transmission in interstate commerce of bets or wagers or information assisting in the placing of bets or wagers."

Now, I submit to the court if you read these transcripts, about 80 per cent of them do not fall within the purview of that statute. There are, concededly, bets placed. We can't argue that. The amount of the bets placed may or may not be subject to argument, depending on whether the expert's testimony is that a nickel means five hundred, whether that is accurate or not. That is the court's purview.

However, this does not establish that Mr. Katz was in the business of betting or wagering.

I submit the following consideration to the court. We have no information, outside information supplied by the Government as to what Mr. Katz does or does not do. We do know that he was on the one day on which we had surveillance, fortunately or unfortunately, depending upon the way the case comes out, of plaintiff Katz' activities. We see a man lounging around the pool receiving some phone calls, and not too many, during the course of a day in which some of them there is conversation about
357 bets he may or may not have placed, or at least conversation, as far as I can determine, about sporting events in general.

But there is nothing to indicate from this full day's activities, which apparently was a betting day, that he was engaged in that business or any other business. The only evidence we have is that he placed bets.

We don't know what his business is. I submit that a business man, a person engaged in any other endeavor, real estate, grocery store, what-have-you, could still devote some time to a hobby or, call it what you want, his own penchant, fetish for betting, and not be in the business of betting.

The statute is designed primarily, I assume, to catch those persons who actually make a business of it, who earn their living or make their livelihood from it. That's my understanding of what the Internal Revenue—how the Internal Revenue defines the word business.

And I say that the expert himself made in testimony, gave in testimony about the business of Mr. Katz. He testified as to what in his opinion the activities that Mr. Katz was engaged in. And the activity that he stated that he thought Mr. Katz was engaged in was placing wagers for others and receiving some commission from it, as I recall, some percentage or a consideration. That was the exact word. This does not mean that that was Mr. Katz' business.

358 So what we have here is a vacuum, a supposition or an inference that it may have been his business. But I don't think that an inference is sufficient to convict a person beyond a reasonable doubt.

The next situation again is that that goes to reasonable doubt. The exhibits, a portion of them were blown up for the court's consideration, were used by Mr. Gunn to determine his basic conclusions on and they were hampered in that some were printed and had handwriting on them. Nowhere did the Government bring forth any person to express his opinion that this handwriting was the handwriting of Mr. Katz. Therefore, the mere fact that Mr. Katz was in possession of these—what do you call them? line sheets, owe sheets, betting markers, does not, contrary to the expert's opinion, explain that he did or did not make the bet or these were recordations of his bets or anybody else's bets.

The expert assumed that the notations on the markers were Mr. Katz'. There is no evidence to that effect.

His opinion must be a bit blurred by what—his assumption was, naturally, and he stated on the stand so, that if Mr. Katz owned them, they were his.

So I submit to the court that the FBI is a rather thorough-going organization. They book people in. They get handwriting exhibits. The court has seen, I am
359 sure, numerous cases where the FBI experts have got up and have compared handwriting exhibits and said, "Yes, this is the handwriting of the defendant."

But they didn't choose to do this for some reason. Perhaps the reason they chose not to do it was because it is not in the handwriting of Mr. Katz.

If you look at the telephone records I submit that the fact that the telephone records show a long-distance call and a charge for a long-distance call does not prove that in fact a long-distance call was made unless the person who actually dialed that call were here to testify that such a call was made.

There is a hiatus in the proof of the Government that there was transmission in interstate commerce, again going to the fact, first, that before we can use any statements allegedly by Mr. Katz made on the telephone that in fact there was first placed a call to a point across the state line.

I don't think that the telephone records showed it. I think that there is a contradiction between the statements of the FBI agents as to the number that they saw on the booth that Mr. Katz was in and the number which the call, if it was made, was charged to.

Now, the inference that Mr. Farber tried to express was that Mr. Katz was lying to the operator.
360 Well, that isn't the only inference that you can arrive at when he stated the number he was calling from. There is no inference that he was lying whatsoever.

So there is an equal inference that he was at the booth that the FBI agents say he was at, or he was at some other number, or it wasn't him making the call. There is an element of doubt.

Count 1 charges that on February 19th at approximately 8:43 a.m. that he, Mr. Katz, committed such an act. As I construe Exhibit 1 there is nothing in there prohibited by statute. I don't believe there was a bet nor was there any assistance in the placing of wagering information.

Count 2 alleges that he on the same date at approximately 8:54 p.m. did make a telephone call. I think there is no evidence whatsoever to sustain Count 2 that there was a call made at 8:54 p.m.

The next is February 20th at 8.31 p.m.—excuse me—a.m. There is a telephone call in which the expert testified that there was a bet made.

Count 4, 9:31 a.m. "Give me Duquesne for a dime." Assuming that you feel that the evidence was sufficient that Mr. Katz was in the business, I would assume that he made a bet assuming that you believe that there was a call made across state lines and you believe
361 it beyond a reasonable doubt.

Count 5 is the February 23rd conversation. I don't believe on February 23rd you can find any betting information given, nor do I believe that you can find a bet placed.

Count 6 is February 24th, 8:56 a.m. There is, according to the expert, a bet placed.

February 25th at 8:46 a.m. there are the words, "Bet a nickel," which I assume can be construed as a bet. I believe there are two bets on that date. Two different phone calls which would also go to February—Count 8.

Again—your Honor, the only thing I can say is that the case is extremely weak. It is especially weak when you deal with the question of the business of Mr. Katz. I sincerely believe that it is so weak that without the extra-judicial statements of Mr. Katz you would never be able on the evidence to produce before the court, the external evidence, have a corpus delicti sufficient to admit the other statements.

You certainly can't use the statements to build up a corpus delicti where it did not exist. And nowhere, even the statement of Mr. Katz, "You would take me out of business. I am a handicapper"—the expert for the Government said that you can be a handicapper and that could be your business and not have betting as your busi-
362 ness.

I again say it is a question of probably semantics. But today in the law we deal very largely in semantics, because a person if he doesn't do what the law prohibits, or in income tax it is the difference between evasion and avoidance, he has to be strictly prohibited from doing a certain act.

And I submit to the court if a person is a handicapper and that is his business, and let's say he is being paid for handicapping, and the way he is being paid for handicapping and making good handicapping is by somebody else paying him on the bets that somebody else makes, that the man's business is not that of betting or wagering; the betting or wagering is incidental to his business of handicapping for somebody, and he is being paid for his handicapping, if that is the case, and he is not in the business of betting or wagering even under the Government's most favorable testimony, then the court should acquit him on all counts.

Thank you.

Closing Argument on Behalf of the Plaintiff

Mr. Farber: Just a few things, your Honor.

With respect to Bergland v. United States, which is found in 318 F. 2d, I believe that counsel is in error.

363 In that case the court did find that past posting came within the confines of Section 1952, and in so doing they reversed the lower court decision.

But, quite frankly, I don't think that has anything to do with this case.

Now, what is our evidence that these records are indeed the records of the defendant? What is the evidence that these records that were found on Defendant Katz' person and in his room are his records? It is true that the FBI could have come in here with a handwriting expert, but to do so would be an unnecessary act and a waste of the court's time plus the Government's money. It seems a little unusual and kind of silly.

In view of the evidence we would respectfully submit that it would be unnecessary to bring in such a handwriting expert.

What evidence do we have that the records were Defendant Katz's? One was found on his person, the rest were found in his room. The records correlate and interrelate pretty definitely with the conversations so that an expert is able to trace a bet which was transcribed in the

transcripts that the court has to the very records that are found on Defendant Katz's person. So I don't think there is much doubt that those records are Mr. Katz' even
364 though we didn't perform the unnecessary act of having a handwriting expert.

There are many ways of proving that a man has or has not made certain records. In this case we have done it by good, strong circumstantial evidence.

Now, with respect to the question of business was Mr. Katz in the business of betting and wagering? We have his admission, that's for certain.

Again, contrary to counsel's assertion concerning corpus delicti, I think his argument of corpus delicti is somewhat misplaced. But contrary to his assertion, in this Circuit and, as a matter of fact, in all the federal courts of the United States the statement itself can be used to establish corpus delicti as long as the statement plus the other evidence shows beyond a reasonable doubt that that's what we are talking about, the admission is reasonably true, it appears reasonably that the administration is true. That's all that the federal courts demand.

So, therefore, to establish that Mr. Katz was in the business of betting we have his admission that he was in the business of betting.

What did he say? He said if the records were taken from him he couldn't earn a living any place else and couldn't earn, I think, $60 a week, something on that
365 order.

But, in addition to that, let's assume for just an instant that Mr. Katz has three other jobs plus being in the business of wagering over the telephone in interstate commerce. The mere fact that Mr. Katz might also be a butcher or baker or an accountant would not—and I would reemphasize that, your Honor—would not proscribe him or limit him from having two businesses.

For instance, there are attorneys who also are in real estate. And for income tax purposes, which I think is a good analogy, under the income tax law if an attorney who practices law during most of the week sells certain

amounts of real estate which he has invested in this real estate is taxed not as capital gain but as ordinary income because he is "in the business of selling real estate."

So a man can have any number of businesses. Certainly in this case, disregarding Mr. Katz' admissions that he was in the business, and assuming, though, there is no evidence to that effect, that Mr. Katz was an accountant, he is still in the business of wagering and betting.

Comments and Finding of the Court

The Court: Well, gentlemen, I was just checking each of the counts against the memoranda that were in the file here, Government's Exhibits 1 through 6, and it
366 is my opinion that the evidence shows beyond a reasonable doubt that the defendant was engaged in the business of wagering, and that as such on each occasion indicated by the counts in the Indictment he did transmit in interstate commerce information pertaining to wagers or did in fact place bets.

The court is entitled, I think, to draw certain inferences here that seem apparent in view of the fact that there is no evidence to the contrary.

These markers found in the possession of the defendant would indicate that they were his. He has not explained away their being in his possession. We will assume, therefore, that they are his.

The volume of business being done as seems to appear from the exhibits would indicate that this more than a casual, incidental occupation of the defendant. This court can well draw the inference, and the court does find, that it was a business and the defendant was engaged therein as a person.

The court finds the defendant guilty on all counts as charged.

Mr. Marks: Your Honor, I don't know whether it was a typographical error, but Count 2 does state 8:54 p.m., and

I believe there was an absolute lack of evidence on any night calls.

367 The Court: Well, I take it that where the Indictment alleges that certain things occurred at approximately 8:45—

Mr. Farber: It is 8:54 p.m., your Honor. That would be a typographical error.

The Court: —that the fact that the Government doesn't prove that it happened exactly at this time is not important.

Mr. Marks: Well, what I am—

The Court: On or about that time and that date this conversation took place.

Mr. Marks: That is what Count 1 says, your Honor. You see, both Count 1 and Count 2 are both on the 19th.

The Court: Yes.

Mr. Marks: One alleges a call in the a.m. and the other alleges a call in the p.m.

The Court: But the transcript shows two conversations on that date.

Mr. Marks: In the morning.

The Court: In the morning. And the mere fact that the time does not concur with that in the night and that the time here is not an essential element of the crime seems to me to be of no consequence. It is sufficiently near to conform to the allegations in the counts.

368 Mr. Marks: Does the court wish to have a probation report, pre-sentence report?

The Court: Upon the court's finding the defendant, of course, stands convicted of the offenses charged in all eight counts.

The matter will be referred to the probation office for investigation and report, and a hearing upon the report will be set for June 21st at 2:00 o'clock in this room.

Mr. Marks: May the defendant remain out on bail?

The Court: Yes, the defendant may remain on bail.

Mr. Marks: And, your Honor, I will file the formal papers to set a motion for new trial for the same date.

The Court: Very well.

Mr. Marks: Thank you.

Mr. Farber: I gather, so that we don't have a problem of jurisdiction, that the defendant is being given an extension of the five-day period.

Mr. Marks: I will file it within the five days.

The Court: He will file it within the five days.

369 Mr. Marks: And notice it for the 21st.

The Court: There being nothing further, we stand adjourned.

(Whereupon, at 3:30 o'clock p.m., Thursday, May 20, 1965, an adjournment was taken.)

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370 Reporter's Certificate to foregoing transcript
(Omitted in printing.)

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371 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 34715-CD

Commissioner's Docket No. 42

Case No. 129

Motion for a New Trial and for a Judgment of Acquittal Points and Authorities in Support Thereof—Filed May 24, 1965

The defendant moves the court to grant him a new trial for the following reasons:

1) The evidence received against the defendant was the result of an unlawful search and seizure or seizures, and was improperly admitted over objection of the defendant.

2) The statute under which the defendant was convicted is void on its face and as applied in violation of Amendments One and Five to the United States Constitution.

3) The verdict was not supported by substantial evidence.

4) The finding or verdict of guilty as to all counts is defective in that only one offense, if any, was committed by the defendant.

5) The indictment was defective in alleging in multiple counts a single violation of statute.

This motion will be argued to the court on June 21, 1965.

B. MARKS

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372 **Points and Authorities in Support of Motion**

1) Defendant incorporates herein by reference all points and authorities heretofore submitted to the court in support of the motion to suppress evidence and the motion to dismiss the indictment.

2) It is respectfully submitted that the offense denounced by § 1084 is a "continuing offense" and separate acts constituting a single offense cannot be separately charged in the indictment or separately construed as a violation of the statute.

In *Bell* vs. *U.S.*, 349 U.S. 81, 99 Law Ed. 905, the defendant had transported two women across state line on the same trip and in the same vehicle. In an opinion written by Mr. Justice Frankfurter, the question was "once more it becomes necessary to determine 'what Congress has made the allowable unit of prosecution'..."

Section 1084 purportedly punishes the person engaged in the business of betting or wagering for using a wire facility. Nothing in the statute indicates that a separate telephone call is a separate offense for each use of the wire. In fact, by the nature of the statute, it contemplates a continued use of the wire facilities since it would be used by a person "in the business."

In the *Bell* case, the court stated:

"When Congress has the will it has no difficulty in expressing it—when it has the will, that is, of de-

fining when it desires to make the unit of prosecution and, more particularly to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in
373 favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. This in no wise implies that language used in criminal statutes should not be read with the saving grace of oommon sense with which other enactments, not cast in technical language, are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime. It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses . . ."

Respectfully submitted,

/s/ B. Marks
Burton Marks

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374 **Proof of Service by Mail**

(Omitted in printing)

(File endorsement omitted)

375 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 34715-JWC-CD

(Title omitted)

Opposition to Defendant's Motion for Judgment of Acquittal, and in the Alternative, for New Trial—Filed June 3, 1965

The United States of America opposes defendant Charles Katz's Motion for a New Trial and for a Judgment of Acquittal, on the grounds that defendant Katz is not legally entitled to such relief.

This opposition is based on all the Court's records pertaining to the above-entitled case and on the attached Memorandum of Points and Authorities.

Respectfully submitted,

MANUEL L. REAL
United States Attorney

JOHN K. VAN DE KAMP
Assistant U.S. Attorney
Chief, Criminal Section

/s/ BENJAMIN S. FARBER
Benjamin S. Farber
Assistant U.S. Attorney

Attorneys for Plaintiff
United States of America

376 **Memorandum of Points and Authorities**

I

Defendant Charles Katz is not entitled to a judgment of acquittal in this case.

The Ninth Circuit stated the rule which governs the granting of a Motion for Judgment of Acquittal in *Las Vegas Merchant Plumbers Ass.* v. *United States,* 210 F.2d 732 (9 Cir. 1954) at page 742:

> "The verdict of a jury will be sustained if there is any substantial evidence in the record to support it. In determining whether the evidence is sufficient to support the verdict, we must consider the evidence in the light most favorable to the Government. Glasser v. U.S., 1942, 315 U.S. 60, 69, 62 S.Ct. 457, 86 L.Ed 680; Woodward Laboratories, Inc., v. U.S., 9 Cir. 1952, 198 F.2d 995."

See also *Schoppel* v. *United States,* 270 F.2d 413 (4th Cir. 1959).

In *Las Vegas Merchant Plumbers Ass., supra,* the trier of the fact was the jury. It is respectfully submitted the circumstance is not different merely because the trier of fact is the Court.

In answer to the other points raised by defendant Charles Katz, it is respectfully submitted that they have been already considered at great length by this Court.

Furthermore, we do not see how the case *Lamont* v. *the Postmaster General of the United States,* cited by defendant Katz in his letter to this Court assists Katz with respect to the question presented by this case. Frankly, we do not see how it is relevant.

II

Defendant Charles Katz is not entitled to an order granting him a new trial. A motion for a new trial is addressed to the sound discretion of the trial court, *Johnson* v. *United States,* 265 F.2d 496 (4th Cir. 1959), but motion for
377 a new trial is not favored. *United States* v. *Costello,* 225 F.2d 876 (2nd Cir. 1958).

The test for whether or not a motion for a new trial should be granted appears to be contained in *United States* v. *Wilson,* 178 F. Supp. 881 (D.C. D.C. 1959) in which case Judge Holtzoff pointed out at page 884:

> "... 'It [motion for a new trial or order granting new trial] should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.'"

It is respectfully submitted that there was substantial evidence upon which this Court could base its verdict, and this Court should not commit any error which was prejudicial to defendant Katz.

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378 **Certificate of Service by Mail**

(Omitted in printing)

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379 IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION

No. 34715-Criminal

UNITED STATES OF AMERICA

v.

CHARLES KATZ

On this 21st day of June, 1965 came the attorney for the government and the defendant appeared in person and by counsel, Burton Marks.

Judgment—June 21, 1965

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of being engaged in the business of betting and

wagering, knowingly using a wire communication facility for the transmission in interstate commerce of information assisting in the placing of bets and wagers, in violation of Title 18, United States Code, Section 1084, as charged in Counts 1, 2, 3, 4, 5, 6, 7, and 8 of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant pay a fine unto the United States of America in the amount of $300.00 on each of Counts 1, 2, 3, 4, 5, 6, 7, and 8, to begin and run concurrently. (Total fine $300.00).

IT IS ORDERED that the defendant stand committed until the fine is paid, or until he is otherwise discharged as provided by law.

IT IS ORDERED that the execution of the payment of the fine is stayed for a period of twenty four hours.

IT IS ORDERED that the bond of the defendant is exonerated.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JESSE W. CURTIS,
United States District Judge.

L. BROSNAN
by L. A. Brosnan,
Deputy Clerk.

FILED: June 21, 1965

JOHN A. CHILDRESS,
Clerk

380 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 34715 Criminal

(Title omitted)

Minutes of the Court—June 21, 1965

At: Los Angeles, Calif.
PRESENT: Hon. JESSE W. CURTIS, District Judge.
Deputy Clerk: Leonard Brosnan.
Reporter: Jack Ellis.
U.S. Atty, by Assistant U.S. Atty: Robert Talcott.
Defendant: on bond.
Counsel: Burton Marks.
PROCEEDINGS: SENTENCE—all 8 counts—finding of guilty by Court. Statements by court, counsel and defendant.
IT IS ORDERED that the motion for new trial is denied.
Court sentences defendant to pay a fine unto the United States of America in the amount of $300.00 on each of Counts 1 through 8, to begin and run concurrently.. (Total fine $300.00)
Defendant is ordered to stand committed until fine is paid. Court further orders defendant granted 24 hours stay for payment of fine.
Bond of defendant is exonerated.

JOHN A. CHILDRESS,
Clerk

By L. BROSNAN
Leonard Brosnan
Deputy Clerk

(File endorsement omitted)

381 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 34715-CD

(Title omitted)

Notice of Appeal—Filed June 28, 1965

TO THE CLERK OF THE ABOVE ENTITLED COURT:

PLEASE TAKE NOTICE that the defendant CHARLES KATZ hereby and herewith appeals from the judgment of conviction rendered for violation of Title 18, U.S.C. § 1084 and the sentence of a fine of $300.00 pronounced against him June 21, 1965, the Honorable Jesse W. Curtis, Jr., Presiding, to the Circuit Court of Appeals for the Ninth Circuit.

DATED: June 24, 1965.

/s/ BURTON MARKS
Attorney for Defendant

---

382 **Proof of Service by Mail**

(Omitted in printing)

(File endorsement omitted)

383 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 34715-CD

(Title omitted)

**Appellant's Designation of Record on Appeal—
Filed June 30, 1965**

TO THE CLERK OF THE ABOVE ENTITLED COURT AND TO THE RESPONDENT UNITED STATES OF AMERICA AND ITS ATTORNEYS:

PLEASE TAKE NOTICE that appellant hereby and herewith designates the following record to be transmitted to the Court of Appeals:

1) The reporter's transcript of the proceedings had at the motion to suppress the evidence and of the proceedings had at the time of trial.

2) In the clerk's transcript:

a) The clerk's docket sheet.

b) All minute orders of the clerk.

c) Appellant's motion to suppress the evidence and to return evidence, and his motion to dismiss.

d) Respondent's opposition and any points and authorities filed therewith.

e) Any supplementary points and authorities filed
384 by appellant with respect to any motions directed to the Court.

f) Appellant's notice of motion and motion for new trial and points and authorities and supplementary authorities.

g) The notice of appeal.

h) This designation of record on appeal.

DATED: June 29, 1965.

/s/ BURTON MARKS
Attorney for Appellant

385 **Proof of Service by Mail**

(Omitted in printing)

(File endorsement omitted)

386 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 34715-CD

(Title omitted)

Appellee's Counterdesignation of Record on Appeal—Filed July 6, 1965

TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO THE APPELLANT AND HIS ATTORNEY:

The United States of America counterdesignates in the above-entitled case:

1) As part of the record on appeal all the exhibits which were received in evidence, and also

2) United States of America's Opposition to defendant-appellant's Motion for Judgment of Acquittal, or in the Alternative, Motion for New Trial.

Dated: July 6, 1965.

MANUEL L. REAL
United States Attorney

JOHN K. VAN DE KAMP
Assistant U.S. Attorney
Chief, Criminal Section

BENJAMIN S. FARBER
Assistant U.S. Attorney

/s/ BENJAMIN S. FARBER
Benjamin S. Farber
Assistant U.S. Attorney

Attorneys for Plaintiff
United States of America

387 **Certificate of Service by Mail**

(Omitted in printing)

(File endorsement omitted)

388 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 34715-CD

(Title omitted)

Application for Extension of Time to File Reporter's Transcript on Appeal and Order—Filed September 29, 1965

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss

BURTON MARKS, being duly sworn, deposes and says:

That he is an attorney at law duly authorized to practice in all the courts of this state, and is attorney for appellant Charles Katz in the instant case.

That the appellant Charles Katz has been unable to obtain the necessary funds for ordering the transcript on appeal. That said funds have now been obtained and have been forwarded to the reporter and said transcript is being prepared.

WHEREFORE, declarant respectfully prays that an order be made enlarging the time for the filing of the reporter's transcript on appeal to and including October 25, 1965.

I certify under penalty of perjury the foregoing statements to be true and correct.

Executed at Beverly Hills, California this 24th
389 day of September, 1965.

/s/ BURTON MARKS

Order

Petitioner is granted an addition of time for filing the reporter's transcript on appeal to and including October 25, 1965.

PICASOS W. HULL
Judge

390 **Proof of Service by Mail**

(Omitted in printing)

(File endorsement omitted)

391 IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. _____

(Undocketed)

CHARLES KATZ, *Appellant*,

v.

UNITED STATES OF AMERICA, *Respondent*

Appellant's Statement of Points and Designation of Record—Filed January 12, 1966

TO THE CLERK OF THE ABOVE ENTITLED COURT AND TO THE RESPONDENT UNITED STATES OF AMERICA, AND ITS ATTORNEYS:

PLEASE TAKE NOTICE that Appellant hereby designates the following Record on Appeal in the above entitled cause:

(1) The Clerk's Transcript on Appeal.

(2) The Reporter's Transcript on Appeal.

(3) Appellant designates the following points to be raised on appeal:

A. The conviction of Defendant and Appellant was based on evidence seized in violation of Amendment IV to the United States Constitution.

B. The statutes under which Defendant and Appellant was convicted are unconstitutionally vague.

C. As a matter of law, Defendant and Appellant committed no crime.

D. The statutes under which Defendant and Ap-
392 pellant was convicted are unconstitutional in violation of Amendments I and V to the United States Constitution.

E. As a matter of fact and law the evidence was insufficient to sustain the conviction of Defendant and Appellant.

Respectfully submitted,

/s/ B. MARKS
BURTON MARKS,
Attorney for Appellant

---

393 **Proof of Service by Mail**

(Omitted in printing)

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395 IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before: CHAMBERS and BARNES, Circuit Judges, and POWELL, District Judge

Minute Entry of Order of Argument and Submission—October 7, 1966

This cause coming on for hearing, Burton Marks, argued for the appellant, and Robert L. Brosio, Asst. United States Attorney, argued for the appellee, thereupon the Court ordered the cause submitted for consideration and decision.

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396 IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before: CHAMBERS and BARNES, Circuit Judges, and POWELL, District Judge

Minute Entry of Order Directing Filing of Opinion and Filing and Recording of Judgment—November 17, 1966

ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk and that a judgment to be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

397 IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,648

CHARLES KATZ, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Southern District of California, Central Division

Opinion—November 17, 1966

Before: CHAMBERS and BARNES, Circuit Judges and POWELL, District Judge

POWELL, District Judge:

The appellant was charged in each count of an eight count indictment with a violation of Title 18 USC 1084.[1] That statute proscribes the interstate transmission by wire communication of bets or wagers, or information as-
398 sisting in the placing of bets or wagers by a person engaged in the business of betting or wagering. Each count involved a violation on a different date or at different times on the same date. Appellant waived a jury. The district judge found appellant guilty on all counts.

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[1] The pertinent part of 18 USC 1084 is as follows:

"(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

"(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal."

The appellant moved to suppress evidence in the possession of the government and for the return of the evidence and the dismissal of the indictment. Following a hearing, the motions were denied. On the motion to suppress the evidence was substantially as follows:

In February of 1965 the appellant was seen placing calls from a bank of three public telephone booths during certain hours and on an almost daily basis. He was never observed in any other telephone booth.

In the period of February 19 to February 25, 1965, at set hours, Special Agents of the Federal Bureau of Investigation placed microphones on the tops of two of the public telephone booths normally used by the appellant. The other phone was placed out of order by the telephone company. The microphones were attached to the outside of the telephone booths with tape. There was no physical penetration inside of the booths. The microphones were activated only while appellant was approaching and actually in the booth. Wires led from microphones to a wire recorder on top of one of the booths. Thus the F.B.I. obtained a record of appellant's end of a series of telephone calls.

A study of the transcripts of the recordings made of the appellant's end of the conversations revealed that the conversations had to do with the placing of bets and the obtaining of gambling information by the appellant.

On February 23, 1965, F.B.I. Agent Allen Frei rented a room next to the appellant's apartment residence. He listened to conversations through the common wall without the aid of any electronic device. He overheard the appellant's end of a series of telephone conversations and took notes on them. These notes and the tapes made from the telephone booth recordings were the basis of a search warrant which was obtained to search appellant's apartment. The search warrant called for "* * * bookmaking records, wagering paraphernalia, including but not limited
399 to, bet slips, betting markers, run-down sheets, schedule sheets indicating the lines, adding machines, money, telephones, telephone address listings * * *". (See N. 4). The articles seized are described in the return (C.T. 20-22). They are all related to the categories described in the warrant.

During the conversations overheard by Agent Frei, the appellant made numerous comments to the effect that "I have Northwestern minus 7", and "Oregon plus 3." Also, there was a statement by the appellant such as, "Don't worry about the line. I have phoned Boston three times about it today."

At the trial evidence was introduced to show that from February 19 to February 25, 1965, inclusive, the appellant placed calls from two telephone booths located in the 8200 block of Sunset Boulevard in Los Angeles. The conversations were overheard and recorded every day except February 22. The transcripts of the recordings and the normal business records of the telephone company were used to determine that the calls went to Boston, Massachusetts, and Miami, Florida.

The testimony of Joseph Gunn of the Administrative Vice Division of the Los Angeles Police Department, who was the expert called by the government in the area of bookmaking, was that the transcripts of the conversations showed that bets were made and information assisting in the placing of bets was transmitted on the dates and at the times alleged in the indictment. Bets were recorded like "Give me Duquesne minus 7 for a nickel."[2] Information relating to the line and the acquiring of credit was also transmitted.

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[2] A. Mr. Katz is paying for somebody else and getting a percentage out of it. When he says he is only getting a dollar, this would mean that on a thousand dollar bet he would be getting a hundred dollars in this instance.

Q. Is he using what is called the nickel system?

A. Yes, sir.

Q. In referring to his bets?

A. Yes.

Q. What is the nickel system?

A. The nickel system is terminology in which a $500 bet would be called a nickel, a $1,000 bet would be called a dime. The $100 bets are usually referred to as a dollar or two dollars.

Also when you record on the nickel system you omit to the right of the decimal point so that $2,500 would be written 25 and two small zeros rather than writing four decimal point zero zero." (RT 240).

400 In correlating the transcript of the telephone conversations and line sheets and markers found in appellant's residence during the search pursuant to the warrant, Officer Gunn concluded that appellant was placing wagers with a bookmaker for another person for a consideration.

On February 25, 1965, the appellant was arrested. He was advised by a Special Agent of the F.B.I., Emmett Doherty, that he had a right to remain silent, he had a right to consult counsel, and that any statements he made could be used against him in a court of law. The appellant was arrested on the street. He was later present in his apartment where another agent of the F.B.I. was involved in the search authorized by the search warrant. Appellant asked when he could have his records back. He stated that without them he was out of business and that he knew no other trade. During this exchange, in response to a question about interstate betting, the appellant said that he could not bet locally because the bookmakers would not pay off.

The next day, which was February 26, 1965, Agent Donovan of the F.B.I. met appellant in the lobby of his apartment building to return two personal items which had been taken at the time of the search. Donovan had been with Agent Doherty the day before when Doherty advised the appellant of his rights with respect to statements made to the Federal Agents. Appellant again asked why he could not have his records back. He stated without them he was out of business and that he had been a handicapper and a bettor most of his life. He suggested that if he got his records back he would continue to bet.[3]

---

[3] "THE WITNESS: I returned to Mr. Katz a nail file and a key chain. Upon his taking them he said, 'I can replace these for 35 cents. Why can't I have my records? Without my records I am out of business. I have been a handicapper and a bettor most of my life, and it has taken hours and hours of compilation to prepare these records.'

"Mr. Katz continued as to the time factor in the records, and then suggested that if he could have his records back he would continue betting. And he facetiously made the comment, 'Then I can lead you to the big ones.'" (RT 219, 220).

From all of the evidence in the case the court found the volume of business being done by the appellant indicated that it was not a casual incidental occupation of the
401 appellant. The court found that he was engaged in the business of betting or wagering at the time of the telephone conversations which were transmitted and recorded. (RT 316, 317).

I. *Recording of Phone Booth Conversations.*

The appellant argues that the evidence obtained at the time of the recording of the appellant's end of the conversations in the phone booth constituted an illegal search and seizure in violation of the Fourth Amendment to the United States Constitution. Appellant urges this on authority of *Silverman v. United States,* 365 U.S. 505 (1961), which he says expresses the current attitude of the Supreme Court.

In the Silverman case the agents used a spike microphone which was driven into a party wall. It contacted a heating duct of the house occupied by the petitioners. This enabled the agents to hear conversations in the entire house, including conversations on the telephone. The case was reversed because of the invasion into a "constitutionally protected area." The court said, "the officers overheard the petitioner's conversation only by usurping part of the petitioner's house or office." (365 U.S. at 511). It was held to be a violation of the petitioner's Fourth Amendment rights.

Appellant cites cases which we have considered. In *People of the State of California v. Hurst,* 325 F. 2d 891 (9 Cir. 1963), there was an unlawful invasion of premises used as a residence. We do not consider *Lopez v. United States,* 373 U.S. 427 (1963), as authority sustaining appellant's position as that case sustained the right to record a conversation between a government agent and the suspect. *United States v. Paroutian,* 299 F. 2d 486 (2 Cir. 1962), was reversed because a search of an apartment without a warrant produced evidence later used to search the same apartment after the defendant's right to possession had terminated. This last case would apply only if

we found that the evidence obtained by the recording of the phone conversations here was in violation of appellant's Fourth Amendment rights. This we decline to do.

The public phone booth was used by appellant, who argues that when he occupied it for the purpose of engaging in a personal conversation and closed the door to
402 the booth, he is in effect in his own residence. By invitation from the telephone company and the payment of the toll he says he is entitled to consider the booth protected from intrusion by the Fourth Amendment. In *Smayda v. United States,* 352 F. 2d 251 (9 Cir. 1965), police officers observed events in a stall in a public toilet through a camouflaged hole in the ceiling. The court held that this was not a violation of the Fourth Amendment rights of the defendants on two grounds, 1) the appellants impliedly consented to the search when they carried on their illegal acts in a public toilet, and 2) there was no unreasonable search within the meaning of the amendment. 352 F. 2d at 253, 256.

In *Olmstead v. United States,* 277 U.S. 438 (1928), evidence was introduced which was obtained by tapping the wires of the telephones used by petitioners. It was held that the use of the evidence did not violate the Fourth Amendment rights of defendants.

In *Goldman v. United States,* 316 U.S. 129 (1942), federal agents were permitted to testify to conversations overheard by the use of a detectaphone applied to the walls of a room adjoining the office of the defendant. This is similar to the instant case. It was held not to be an invasion of defendant's office.

In the recent case of *Corngold v. United States,* .... F. 2d .... (9 Cir. Sept. 29, 1966), the appellant objected to the evidence obtained by the use of a "scintillator", an instrument sensitive to radiation. Customs agents saw appellant carrying packages into his apartment. The officers observed the appellant and two other men carrying packages from the apartment to the appellant's car. They followed the appellant as he drove to the Los Angeles International Airport. The scintillator, when used outside of the appellant's apartment, and while following appellant's car, reacted so as to indicate that there was a

radioactive substance in the possession of the appellant. The court there said:

> "Appellant contends that the walls of his apartment were 'penetrated' and his apartment was searched by means of the scintillation detector in violation of his Fourth Amendment rights, and that it was error to admit evidence obtained in this way.
>
> "The agents entered the apartment building through an unlocked public entrance. They employed the
> 403 scintillator in public hallways outside appellant's apartment. Goldman v. United States, 316 U.S. 129 (1942), is controlling authority that appellant's Fourth Amendment rights were not violated. See also On Lee v. United States, 343 U. S. 747, 752-54 (1952)."

The Corngold case sustains the government in the use of the evidence obtained by microphones and tape recordings of the telephone conversations of the appellant in this case. There was no physical entrance into the area occupied by appellant. The Corngold case was reversed on the ground that the agents were not authorized to search the packages in the airport terminal without a search warrant. Here a search warrant was obtained and executed.

II. *The Search Warrant.*

The search warrant described the items to be seized which were instrumentalities of the offense.[4] It is our conclusion that the search warrant does adequately describe the property to be seized. It was not general nor did it described mere evidentiary matter.

In *Gilbert v. United States,* 291 F. 2d 586 (9 Cir. 1961), this court held that the search was unreasonable when

---

[4] "• • • there is now being concealed certain property, namely bookmaking records, wagering paraphernalia, including but not limited to, bet slips, betting markers, run down sheets, schedule sheets indicating the lines, adding machines, money, telephones, telephone address listings which are designed and intended for use as the means of committing criminal offenses in violation of Title 18, United States Code Section 1084, and violations of 441, 4412 and Section 7203 of the Internal Revenue Code. • • •" (Vol. 1. CT 17).

government agents allegedly maneuvered to make the arrest of the defendant in his home. No offense was committed in the presence of the arresting officer. The crime charged was the forgery of a check which the government had in its possession. The items seized were checks and income tax returns which were evidentiary only and not instrumentalities of the crime charged.

We have reviewed the authorities cited by the appellant. The case of United States v. Clancy, 276 F. 2d 617 (7 Cir. 1960), (reversed on other grounds in 365 U.S. 404 312), more nearly resembles the fact situation here. The search warrant described the property to be seized as in this case.[5]

In *Leahy v. United States,* 272 F. 2d 487, 491 (9 Cir. 1959), concerning a search, this court stated as follows:

> "* * * The revenue agents in the instant case seized an adding machine, a telephone, record books, receipts, pencils, pens, money and the keys to safety deposit boxes, as well as a number of rifles, shotguns and pistols. It is clear from the items seized that the search was specifically directed to the instrumentalities used in the commission of the crime of unlawfully engaging in the business of wagering. The records of an illicit business are instrumentalities of crime. Marron v. United States, 1927, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (officers incident to arrest may lawfully seize account books and papers used in carrying on the criminal enterprise.) Such were the records obtained in this case. The search was, therefore, a reasonable one."

---

[5] "* * * divers records, to wit books, memoranda, tickets, pads, tablets and papers recording the receipt of money from and the money paid out in connection with the operation of a wagering business on said premises, such files, desks, tables and receptacles for the storing of the books, memoranda, tickets, pads, tablets and papers aforesaid, and divers receptacles in the nature of envelopes in which there is kept money won by patrons * * * and divers other tools, instruments, apparatus, United States currency and records * * *'". (276 F. 2d at 624).

The search warrant was valid and the court was correct in refusing to suppress the evidence obtained on the search.

III. *The Indictment.*

Counsel argues that there was a single violation under the statute, 18 USC 1084. This is not borne out by the record as we view it. Each call was a separate act of the defendant in using the telephone and would constitute a separate and distinct offense.

In construing a related statute to 18 USC 1084, the court in *United States v. Teemer,* 214 F. Supp. 952, 958 (N.D. W.Va. 1963), said:

405

> "* * * (T)he 'course of conduct' referred to in the * * * legislative history of section 1952, refers to the nature of the business promoted or facilitated—and not to the essence of the federal offense, which is 'travel'. The phrase seems to refer to the fact that the Act was designed to attack an entrenched operation rather than a sporadic poker game or floating crap game. No act of travel is to be deemed unlawful unless the enterprise is a continuing one; but once the continuity of the enterprise is established, any act or travel * * * is a daily or regular event, and thus, perhaps, a 'continuing' activity. * * *"

Mitchell v. United States, 142 F. 2d 480 (10 Cir. 1944), was an appeal from a conviction of mail fraud. It was held that a continuing scheme once established may support additional charges of violation of the statute. Each act of mailing would constitute a separate and distinct offense once the scheme was established. That woud be the case here, as was found in the Teemer case supra under 18 U.S.C. 1952.

IV. *Constitutionality of 18 USC 1084*

Appellant urges that the statute is unconstitutional in that it is indefinite, vague and uncertain, and therefore violates the Fifth Amendment. In support of his argument

that this statute is void for vagueness, appellant quotes language from the recent case of *Giaccio v. Pennsylvania,* 382 U. S. 399 (1966). The statute involved there was an 1860 law of Pennsylvania that permitted the taxing of costs against a defendant acquitted in a criminal case. A reading of that statute shows that it fixed no standards for its application. It was vague and uncertain.

In *Turf Center, Inc. v. United States,* 325 F. 2d 793, 795 (9 Cir. 1963), this court held 18 USC 1952 as not void for vagueness. That section is similar to and a companion section to 18 USC 1084.

> "A statute meets the standard of certainty required by the Constitution if its language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. • • •
> The fact that in some cases it may be difficult to de-
> 406 termine the side of the line on which a particular fact situation falls is not sufficient reason to hold the language too ambiguous to define a criminal offense. • • •"

We do not consider the authorities cited by the appellant as sustaining his position that this statute is void or that it interferes with the right of free speech. The plain and unambiguous language used in the statute is entitled to its ordinary and reasonable interpretation. This statute meets the standard of certainty required by the Constitution.

V. Sufficiency of the Evidence.

A complete review of the record has been made. The evidence was detailed and was not substantially disputed. The defendant presented no testimony. We are convinced that there was sufficient evidence to sustain the conviction of the defendant.

The judgment of conviction is affirmed.

407 IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,648

CHARLES KATZ, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Judgment—Filed and Entered November 17, 1966

APPEAL from the United States District Court for the Southern District of California, Central Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

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408 Clerk's Certificate to foregoing transcript
(Omitted in printing.)

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409 SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1966

No. 895

CHARLES KATZ, *Petitioner*,

v.

UNITED STATES

Order Allowing Certiorari—March 13, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted limited to Questions 1 and 2 presented by the petition which read as follows:

"1. Whether evidence obtained by attaching an electronic listening and recording device to the top of a

public telephone booth used and occupied by the Petitioner is obtained in violation of the Fourth Amendment to the United States Constitution.

A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such booth is obtained in violation of the right to privacy of the user of the booth.

B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.

"2. Whether the search warrant used by the Federal officers in the instant case violated the Fourth Amendment to the United States Constitution in that said warrant was (a) not founded on probable cause; (b) an evidentiary search warrant and (c) a general search warrant."

The Court also wishes counsel to brief and present oral argument on the holding in Frank v. United States, 347 F. 2d 486 as it may affect this case.

---

411 SUPREME COURT OF THE UNITED STATES

No. 895, October Term, 1966

CHARLES KATZ, *Petitioner*,

v.

UNITED STATES

ON CONSIDERATION OF THE MOTION of the petitioner for leave to proceed further herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

May 22, 1967.

☆ U. S. GOVERNMENT PRINTING OFFICE 1967—266326/P.O. 970

FILED
DEC 22 1966
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~895~~ 35

CHARLES KATZ,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BURTON MARKS
8847 Wilshire Boulevard
Beverly Hills, California 90211
Attorney for Petitioner.

Blanchard Press, Inc., Boston, Mass. — Law Printers

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   A. Unconstitutionally vague and
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5. Whether As A Matter Of Fact And Law, The Evidence Was Insufficient To Sustain The Conviction Of Petitioner And Petitioner's Motion For A Judgment Of Acquittal Was Erroneously Denied 12

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In the
Supreme Court of the United States

OCTOBER TERM, 1966

No.

CHARLES KATZ,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, JUDGMENT AFFIRMING JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

This is a Petition of Charles Katz for Writ of Certiorari to review the judgment and order made by the Court of Appeals for the Ninth Circuit affirming the judgment against Charles Katz made and entered by the United States District Court for the Southern District of California on May 20, 1965.

A copy of the affirming judgment and of the opinion of the Court of Appeals for the Ninth Circuit, which are as

yet unreported, are attached. (Appendices A and B, respectively.)

Jurisdiction

The District Court had jurisdiction in this case under Title 18 U.S.C. §1084.

The Circuit Court had jurisdiction under Title 28 U.S.C. §1291 and §1294.

This Court has jurisdiction under Title 28 U.S.C. §1254 (1) to review the judgment in question.

Statement of the Case

On March 17, 1965, an eight-count indictment was filed against Charles Katz. Each count of the indictment charged a violation of Title 18, U.S.C., §1084 [interstate transmission of bets and wagers and information assisting in the placing of bets and wagers]. Each of said counts involved violations of §1084 on different dates or at different times on the same date.

Prior to the trial of the within matter, Petitioner filed a Motion to Suppress Evidence and for Return of Evidence, which motion was denied. Subsequently, Petitioner moved to dismiss the indictment, pursuant to Rule 12 of the Federal Rules of Criminal Procedure, which motion was also denied.

Thereafter, Petitioner entered a plea of not guilty and a trial by court, the Honorable Jesse Curtis, Judge Presiding, was held. On May 20, 1965, the court found Petitioner guilty on all counts as charged. Petitioner's motions for a new trial and for a judgment of acquittal were denied; whereupon, Petitioner was fined the sum of $300.00. Thereafter, Petitioner filed a Notice of Appeal.

On November 17, 1966, the Court of Appeals for the Ninth Circuit affirmed the decision of the District Court.

Questions Presented

1. Whether evidence obtained by attaching an electronic listening and recording device to the top of a public telephone booth used and occupied by the Petitioner is obtained in violation of the Fourth Amendment to the United States Constitution.

   A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

   B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.

2. Whether the search warrant used by the Federal officers in the instant case violated the Fourth Amendment to the United States Constitution in that said warrant was (a) not founded on probable cause; (b) an evidentiary search warrant and (c) a general search warrant.

3. (a) Whether the finding of guilty as to all counts in the indictment was erroneous in that only one offense, if any, was committed by Petitioner and (b) whether the indictment was defective in alleging in multiple counts a single violation of Title 18, U.S.C. §1084.

4. Whether the statute under which Petitioner was convicted is:

   A. Unconstitutionally vague and

   B. Unconstitutional in violation of Amendments I and V to the United States Constitution.

5. Whether as a matter of fact and law, the evidence was insufficient to sustain the conviction of Petitioner and Petitioner's motion for a judgment of acquittal was erroneously denied.

Statutes and Constitutional Provisions Involved

The relevant constitutional and statutory provisions are printed in Appendix C; they are:

Title 18, U.S.C., §1084; Amendments I, IV and V to the United States Constitution.

Statement of the Facts

A substantial portion of the evidence introduced against the Petitioner in the trial court was obtained by agents of the Federal Bureau of Investigation by recording conversations that were had by the Petitioner in a public telephone booth. The conversations were overheard and recorded by means of an electronic device which was attached to the top of the telephone booth. No part of the microphone physically penetrated the telephone booth.

After Petitioner was arrested by the F.B.I. agents, his apartment was searched pursuant to a warrant. The evidence which was seized pursuant to the warrant was procured as a result of the information obtained from the "tap" of Petitioner's telephone conversations.

The expert witness who testified for the prosecution stated that without the transcripts made from the "tap" of Petitioner's telephone conversations, he was unable to determine how much money was wagered by the Petitioner and whether the Petitioner was betting for someone else.

The most that the expert could state was that Petitioner was a professional handicapper; he could not state that he was a bettor. In fact, no prosecution witness could say, without referring to Petitioner's extrajudicial statements, that Petitioner was in the business of betting or wagering. The prosecution's witnesses conceded that the word "handicapper" was not synonymous with being a "bettor".

Reasons For Granting the Writ

While Petitioner considers all questions presented herein substantial, the most important constitutional issue presented by this Petition is as follows: Whether Government agents should be permitted to obtain evidence by use of an electronic listening and recording device attached to the top of a public telephone booth and whether such a booth is a constitutionally protected area. Integrally involved with these questions is the question of whether physical penetration of a constitutionally protected area is necessary before it can be said that the Fourth Amendment's proscription against an illegal search and seizure is applicable. A great deal of confusion and uncertainty exists in the lower Federal Courts and among the practitioners as to whether this Court's decision in *Goldman* v. *United States*, 316 U.S. 129 62 S.Ct. 993, 86 Fed. 1332 (1942) was impliedly overruled in *Silverman* v. *United States*, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed. 2d 734 (1961) in the area of the Fourth Amendment (Search & Seizure).

Argument

1. WHETHER EVIDENCE OBTAINED BY ATTACHING AN ELECTRONIC LISTENING AND RECORDING DEVICE TO THE TOP OF A PUBLIC TELEPHONE BOOTH USED AND OCCUPIED BY THE DEFENDANT IS OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

   A. *Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.*

   B. *Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.*

A substantial portion of the evidence introduced against Petitioner at the trial herein was obtained by F.B.I. agents by use of an electronic listening and recording device which, unknown to Petitioner, was attached to the top of the telephone booth which Petitioner used and occupied. It is submitted that the evidence so obtained should have been ruled inadmissible in that said evidence was obtained pursuant to an illegal search and seizure in violation of Amendment IV to the United States Constitution.

Although this Court in *Olmstead* v. *United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L. Ed 944 (1928) permitted evidence obtained by the use of electronic eavesdropping devices to be introduced at trial, it is respectfully submitted that such evidence is inadmissible under the philosophy recently expressed by the Court in *Silverman* v. *United States*,

supra. The language of *Silverman* indicates that the unrealistic considerations of physical penetration and real property law will not be permitted to cloud the real issue, i.e., whether there has been an illegal search and seizure within the letter and spirit of the Fourth Amendment. In *Silverman,* the Court stated:

> "Here, by contrast, the officers overheard the petitioners' conversations only by usurping part of the petitioners' house or office, a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent. *In these circumstances we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient nicities of tort or real property law.*" (emphasis added)

If ever there was room for doubt, it can be no longer doubted that the right to privacy has constitutional dimensions. *Griswold* v. *Connecticut,* 381 U.S. 479 85 S.Ct. 1678, 14 L. Ed 2d 510 (1965). A man has as much right to be left alone in a private telephone booth as in his own home. Doors are placed on telephone booths for no other purpose than to guarantee its occupant privacy. The conduct of the agents in the instant case is all the more flagrantly violative of the individual's right to privacy because the evidence shows that telephone conversations of innocent third persons were also recorded by the agents.

2. WHETHER THE SEARCH WARRANT USED BY THE FEDERAL OFFICERS IN THE INSTANT CASE VIOLATED THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT SAID WARRANT WAS (A) NOT FOUNDED ON PROBABLE CAUSE; (B) AN EVIDENTIARY SEARCH WARRANT AND (C) A GENERAL SEARCH WARRANT.

It is quite obvious that if the conversations overheard and electronically recorded by the FBI agents were obtained in violation of the Fourth Amendment, the evidence could not be used to establish "probable cause" for an arrest or a search warrant, since such warrants would be the "fruit of the poisonous tree." When an illegal search and seizure has been made and conducted, and the same is shown by evidence, the burden of proof shifts to the government to show probable cause for such search and seizure, sufficient to justify the same. (*United States* v. *Paroutian*, 299 F.2d 486) Without the illegally obtained evidence, "probable cause" for the issuance of the search warrant did not exist.

A search warrant which authorizes the search for evidence is illegal. It violates both the Fourth and Fifth Amendments to the United States Constitution. With respect to the general nature of the search warrant involved in this case, a mere glance at the permissive scope of the search warrant and the inventory of matters and materials taken from the home of the Petitioner dispels any doubt that the search warrant was not only "evidentiary" in nature but that the warrant was a "general" search warrant, which is condemned. *Stanford* v. *Texas*, 379 U.S. 476, 85 S.Ct. 506, 13 L. Ed 2d 431 (1965)

It is also respectfully submitted that because of the seizure of items not specifically described in the warrant, assuming it was not too general, the entire search must be declared invalid since the validly seized items cannot be severed from the invalidly seized items. See *Marcus* v.

Search Warrants, 367 U.S. 717, 81 S.Ct. 1708, 6 L. Ed 2d 1127 (1961)

3. (A) WHETHER THE FINDING OF GUILTY AS TO ALL COUNTS IN THE INDICTMENT WAS ERRONEOUS IN THAT ONLY ONE OFFENSE, IF ANY, WAS COMMITTED BY PETITIONER AND (B) WHETHER THE INDICTMENT WAS DEFECTIVE IN ALLEGING IN MULTIPLE COUNTS A SINGLE VIOLATION OF TITLE 18, U.S.C. §1084.

In the instant case, Petitioner was found guilty as to all counts charged in the indictment. It is respectfully submitted that such a finding was defective in that the offense denounced by Title 18, U.S.C., Section 1084 is a "continuing offense" and separate acts constituting a single offense cannot be separately charged in the indictment or separately construed as a violation of the statute. *Bell* v. *United States,* 349 U.S. 81, 75 S.Ct. 620, 99 L. Ed 905 (1955)

Section 1084 purportedly punishes the person engaged in the business of betting or wagering or using a wire facility in so doing. Nothing in the statute indicates that a separate telephone call is a separate offense for each use of the wire. In fact, by the nature of the statute, it contemplates a continued use of the wire facilities, since only a continued use would make one a person "in the business."

4. WHETHER THE STATUTE UNDER WHICH PETITIONER WAS CONVICTED IS:

A. *Unconstitutionally vague and*
B. *Unconstitutional in violation of Amendments I and V to the United States Constitution.*

Section 1084 and Section 1952 of Title 18, U.S.C. have been held to be, at the very least, ambiguous as to what

situations they apply. See *United States* v. *Bergland* (C.A. Wis. 1963) 318 F. 2d 159, Cert. Denied, 375 U.S. 861, 84 S. Ct 129, 11 L. Ed 2d 88. The earlier *Bergland* decision (209 F. Supp 547, reversed on other grounds) held that a strict construction must be placed upon the meaning of said statutes.

The criminal statute which fails to define the crime with sufficient certainty violates the constitutional guaranty of due process of law. This "void for vagueness" doctrine was stated in the leading cases of *Conally* v. *General Const. Co.*, 269 U.S. 385, 46 S. Ct. 126, 127, 70 L. Ed 322 (1926) and has been reiterated in *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 86 S. Ct. 518, 15 L. Ed 2d 447 (1966).

The statute involved in the instant case provides, in the first place, that only those "engaged in the business of betting or wagering" are prohibited from doing certain acts. This phrase in itself has no defined meaning, and a person doing any one of the prohibited acts would have to guess whether or not he might come within the purview of Section 1084. Furthermore, unlike the "bookmaking statute," Congress has provided no excise tax on one engaged in the "business of betting or wagering," and is thereby placing impermissible sanctions on a business which may or may not be lawful in an individual State.

Secondly, assuming a person is in the business of betting or wagering, he would be guilty of violating Section 1084, if he transmitted through interstate commerce "information assisting in the placing of bets or wagers on any sporting event or contest." Theoretically, then, any person in the business of betting or wagering, whose conduct otherwise falls within the provisions of the statute, would be subject to imprisonment for two years and a fine of $10,000 if he were to indicate in an interstate telephone conversation that the weather in California was "bright and sunny,"

where the recipient of this information used this information for the purpose of determining what horse to bet on in a forthcoming race on a California race track.

It is further submitted that Congress has set up an unreasonable classification in exempting from the purview of the statute the transmission of the same information for use in news media or for the use of persons living in States where betting is legal to another person in another State where betting is also legal. Article IV, Section 2, of the United States Constitution provides that:

> "The citizen of each state shall be entitled to all privileges and immunities of citizens in the several states."

Equally important is the proposition that the statute infringes on and impedes the right to free speech and penalizes otherwise harmless conversation and transmission of information if the person putting forth the information is "engaged in the business of betting or wagering," whatever this vague phrase means.

Whereas statutes are ordinarily presumed to be valid, when a law appears to encroach upon a civil liberty or a civil right—particularly First Amendment protections such as freedom of speech, press, assembly, etc.,—there is a presumption that the law is invalid. See *Thomas* v. *Collins,* 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed 430 (1945); *United States* v. *Carolene Products Co.,* 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 63 S. Ct 1178, 87 L. Ed. 1629 (1943); *Speiser* v. *Randall,* 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed 2d 1460 (1958); *Lamont* v. *Post Master General,* 381 U.S. 301, 85 S. Ct. 1493, 14 L. Ed 2d 393 (1965).

It is respectfully submitted that the use of interstate telephone wires, for the potentially innocuous purpose which is declared criminal by Section 1084, is also "almost

as much a part of free speech as the right to use our tongues." *Lamont* v. *Post Master General, supra.*

5. WHETHER AS A MATTER OF FACT AND LAW, THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION OF PETITIONER AND PETITIONER'S MOTION FOR A JUDGMENT OF ACQUITTAL WAS ERRONEOUSLY DENIED.

In the instant case, the prosecution was required to establish as part of the corpus delicti of the offense with which Petitioner was charged, that Petitioner was "engaged in the business of betting or wagering."

It is respectfully submitted that as a matter of fact and law, the evidence was insufficient to sustain the conviction of Petitioner as one "engaged in the business of betting or wagering." The most that can be said for the evidence introduced by the prosecution, even assuming all of it is admissible, is that Petitioner engaged in isolated betting or in a series of isolated betting transactions. It seems clear that this type of activity does not constitute the business of betting or wagering; betting of a purely social or friendly type is not within the prohibition delineated by Section 1084. See *United States* v. *Simon*, (C.A. Wis. 1957), 241 F. 2d 308, defining the "business of accepting wagers" in connection with a closely related statute—Internal Revenue Code, Section 4401, dealing with the payment of a wagering tax.)

It should also be remembered that there are no federal common law crimes. The elements of the crime are those set forth in the statute, and the prosecutor has the burden of proving each element. Here, they utterly failed to establish that Petitioner was in the "business of betting or wagering."

Conclusion

Petitioner respectfully submits that a review of the record will indicate that this Petition for Writ of Certiorari should be granted and that the judgment of the Circuit Court affirming the Judgment of the District Court should be set aside and the judgment of conviction reversed.

Respectfully submitted,

BURTON MARKS
8847 Wilshire Boulevard
Beverly Hills, California 90211
Attorney for Petitioner.

Appendix A

Office of the Clerk
U. S. Court of Appeals
P. O. Box 547
San Francisco 1, Calif.

Nov 17 1966

Burton Marks, Esq.
8447 Wilshire Blvd.
Beverly Hills, Calif.

Dear Sir:

In case No. 20648 *Katz* v. *USA* an opinion was this day filed, in accordance with which a Judgment or Decree was filed and entered judgment of Decree of the Court below.

Pursuant to Rule 26, and unless the mandate is stayed by the order of the Court, or unless a petition for a rehearing of the cause be filed meantime, and as provided by Rule 23, a mandate of this Court will be due to issue on the expiration of 30 days from date hereof.

Time for certiorari petition, Civil cases: 90 days Criminal cases: 30 days.

Sincerely,
Wm. B. Luck
Clerk

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,648

CHARLES KATZ,
APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

[November 17, 1966]

Appeal from the United States District Court for the Southern District of California, Central Division

Before: CHAMBERS and BARNES, Circuit Judges, and POWELL, District Judge

POWELL, District Judge:

The appellant was charged in each count of an eight count indictment with a violation of Title 18 USC 1084.[1] That statute proscribes the interstate transmission by wire

[1] The pertinent part of 18 USC 1084 is as follows:
"(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.
"(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal."

communication of bets or wagers, or information assisting in the placing of bets or wagers by a person engaged in the business of betting or wagering. Each count involved a violation on a different date or at different times on the same date. Appellant waived a jury. The district judge found appellant guilty on all counts.

The appellant moved to suppress evidence in the possession of the government and for the return of the evidence and the dismissal of the indictment. Following a hearing, the motions were denied. On the motion to suppress the evidence was substantially as follows:

In February of 1965 the appellant was seen placing calls from a bank of three public telephone booths during certain hours and on an almost daily basis. He was never observed in any other telephone booth.

In the period of February 19 to February 25, 1965, at set hours, Special Agents of the Federal Bureau of Investigation placed microphones on the tops of two of the public telephone booths normally used by the appellant. The other phone was placed out of order by the telephone company. The microphones were attached to the outside of the telephone booths with tape. There was no physical penetration inside of the booths. The microphones were activated only while appellant was approaching and actually in the booth. Wires led from microphones to a wire recorder on top of one of the booths. Thus the F.B.I. obtained a record of appellant's end of a series of telephone calls.

A study of the transcripts of the recordings made of the appellant's end of the conversations revealed that the conversations had to do with the placing of bets and the obtaining of gambling information by the appellant.

On February 23, 1965, F.B.I. Agent Allen Frei rented a room next to the appellant's apartment residence. He listened to conversations through the common wall with-

out the aid of any electronic device. He overheard the appellant's end of a series of telephone conversations and took notes on them. These notes and the tapes made from the telephone booth recordings were the basis of a search warrant which was obtained to search appellant's apartment. The search warrant called for "* * * book-making records, wagering paraphernalia, including but not limited to, bet slips, betting markers, run-down sheets, schedule sheets indicating the lines, adding machines, money, telephones, telephone address listings * * *". (See N. 4). The articles seized are described in the return (C.T. 20-22). They are all related to the categories described in the warrant.

During the conversations overheard by Agent Frei, the appellant made numerous comments to the effect that "I have Northwestern minus 7", and "Oregon plus 3." Also, there was a statement by the appellant such as, "Don't worry about the line. I have phoned Boston three times about it today."

At the trial evidence was introduced to show that from February 19 to February 25, 1965, inclusive, the appellant placed calls from two telephone booths located in the 8200 block of Sunset Boulevard in Los Angeles. The conversations were overheard and recorded every day except February 22. The transcripts of the recordings and the normal business records of the telephone company were used to determine that the calls went to Boston, Massachusetts, and Miami, Florida.

The testimony of Joseph Gunn of the Administrative Vice Division of the Los Angeles Police Department, who was the expert called by the government in the area of bookmaking, was that the transcripts of the conversations showed that bets were made and information assisting in the placing of bets was transmitted on the dates and at the times alleged in the indictment. Bets were recorded like

"Give me Duquesne minus 7 for a nickel."[2] Information relating to the line and the acquiring of credit was also transmitted.

In correlating the transcript of the telephone conversations and line sheets and markers found in appellant's residence during the search pursuant to the warrant, Officer Gunn concluded that appellant was placing wagers with a bookmaker for another person for a consideration.

On February 25, 1965, the appellant was arrested. He was advised by a Special Agent of the F.B.I., Emmett Doherty, that he had a right to remain silent, he had a right to consult counsel, and that any statements he made could be used against him in a court of law. The appellant was arrested on the street. He was later present in his apartment where anoother agent of the F.B.I. was involved in the search authorized by the search warrant. Appellant asked when he could have his records back. He stated that without them he was out of business and that he knew no other trade. During this exchange, in response to a question about interstate betting, the appellant said that he could not bet locally because the bookmakers would not pay off.

The next day, which was February 26, 1965, Agent Dono-

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[2] "A. Mr. Katz is playing for somebody else and getting a percentage out of it. When he says he is only getting a dollar, this would mean that on a thousand dollar bet he would be getting a hundred dollars in this instance.

Q. Is he using what is called the nickel system?

A. Yes, sir.

Q. In referring to his bets?

A. Yes.

Q. What is the nickel system?

A. The nickel system is terminology in which a $500 bet would be called a nickel, a $1,000 bet would be called a dime. The $100 bets are usually referred to as a dollar or two dollars.

Also when you record on the nickel system you omit to the right of the decimal point so that $2,500 would be written 25 and two small zeros rather than writing four decimal point zero zero." (RT 240).

van of the F.B.I. met appellant in the lobby of his apartment building to return two personal items which had been taken at the time of the search. Donovan had been with Agent Doherty the day before when Doherty advised the appellant of his rights with respect to statements made to the Federal Agents. Appellant again asked why he could not have his records back. He stated without them he was out of business and that he had been a handicapper and a bettor most of his life. He suggested that if he got his records back he would continue to bet.[3]

From all of the evidence in the case the court found the volume of business being done by the appellant indicated that it was not a casual incidental occupation of the appellant. The court found that he was engaged in the business of betting or wagering at the time of the telephone conversations which were transmitted and recorded. (RT 316, 317).

I. *Recording of Phone Booth Conversations.*

The appellant argues that the evidence obtained at the time of the recording of the appellant's end of the conversations in the phone booth constituted an illegal search and seizure in violation of the Fourth Amendment to the United States Constitution. Appellant urges this on authority of *Silverman* v. *United States,* 365 U.S. 505 (1961), which he says expresses the current attitude of the Supreme Court.

In the Silverman case the agents used a spike microphone which was driven into a party wall. It contacted a heating

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[3] "THE WITNESS: I returned to Mr. Katz a nail file and a key chain. Upon his taking them he said, 'I can replace these for 35 cents. Why can't I have my records? Without my records I am out of business. I have been a handicapper and a bettor most of my life, and it has taken hours and hours and hours of compilation to prepare these records.'

"Mr. Katz continued as to the time factor in the records, and then suggested that if he could have his records back he would continue betting. And he facetiously made the comment, 'Then I can lead you to the big ones.'" (RT 219, 220).

duct of the house occupied by the petitioners. This enabled the agents to hear conversations in the entire house, including conversations on the telephone. The case was reversed because of the invasion into a "constitutionally protected area." The court said, "the officers overheard the petitioner's conversation only by usurping part of the petitioner's house or office." (365 U.S. at 511). It was held to be a violation of the petitioner's Fourth Amendment rights.

Appellant cites cases which we have considered. In *People of the State of California* v. *Hurst,* 325 F. 2d 891 (9 Cir. 1963), there was an unlawful invasion of premises used as a residence. We do not consider *Lopez* v. *United States,* 373 U. S. 427 (1963), as authority sustaining appellant's position as that case sustained the right to record a conversation between a government agent and the suspect. *United States* v. *Paroutian,* 299 F. 2d 486 (2 Cir. 1962), was reversed because a search of an apartment without a warrant produced evidence later used to search the same apartment after the defendant's right to possession had terminated. This last case would apply only if we found that the evidence obtained by the recording of the phone conversations here was in violation of appellant's Fourth Amendment rights. This we decline to do.

The public phone booth was used by appellant, who argues that when he occupied it for the purpose of engaging in a personal conversation and closed the door to the booth, he is in effect in his own residence. By invitation from the telephone company and the payment of the toll he says he is entitled to consider the booth protected from intrusion by the Fourth Amendment. In *Smayda* v. *United States,* 352 F. 2d 251 (9 Cir. 1965), police officers observed events in a stall in a public toilet through a camouflaged hole in the ceiling. The court held that this was not a violation of the Fourth Amendment rights of the defendants on

two grounds, 1) the appellants impliedly consented to the search when they carried on their illegal acts in a public toilet, and 2) there was no unreasonable search within the meaning of the amendment. 352 F. 2d at 253, 256.

In *Olmstead* v. *United States*, 277 U.S. 438 (1928), evidence was introduced which was obtained by tapping the wires of the telephones used by petitioners. It was held that the use of the evidence did not violate the Fourth Amendment rights of defendants.

In *Goldman* v. *United States*, 316 U.S. 129 (1942), federal agents were permitted to testify to conversations overheard by the use of a detectaphone applied to the walls of a room adjoining the office of the defendant. This is similar to the instant case. It was held not to be an invasion of defendant's office.

In the recent case of *Corngold* v. *United States*, — F. 2d— (9 Cir. Sept. 29, 1966), the appellant objected to the evidence obtained by the use of a "scintillator", an instrument sensitive to radiation. Customs agents saw appellant carrying packages into his apartment. The officers observed the appellant and two other men carrying packages from the apartment to the appellant's car. They followed the appellant as he drove to the Los Angeles International Airport. The scintillator, when used outside of the appellant's apartment, and while following appellant's car, reacted so as to indicate that there was a radioactive substance in the possession of the appellant. The court there said:

> "Appellant contends that the walls of his apartment were 'penetrated' and his apartment was searched by means of the scintillation detector in violation of his Fourth Amendment rights, and that it was error to admit evidence obtained in this way.

"The agents entered the apartment building through an unlocked public entrance. They employed the scintillator in public hallways outside appellant's apartment. Goldman v. United States, 316 U.S. 129 (1942), is controlling authority that appellant's Fourth Amendment rights were not violated. See also On Lee v. United States, 343 U. S. 747, 752-54 (1952)."

The Corngold case sustains the government in the use of the evidence obtained by microphones and tape recordings of the telephone conversations of the appellant in this case. There was no physical entrance into the area occupied by appellant. The Corngold case was reversed on the ground that the agents were not authorized to search the packages in the airport terminal without a search warrant. Here a search warrant was obtained and executed.

II. *The Search Warrant.*

The search warrant described the items to be seized which were instrumentalities of the offense.[4] It is our conclusion that the search warrant does adequately describe the property to be seized. It was not general nor did it describe mere evidentiary matter.

In *Gilbert* v. *United States,* 291 F. 2d 586 (9 Cir. 1961), this court held that the search was unreasonable when government agents allegedly maneuvered to make the arrest of the defendant in his home. No offense was committed in the presence of the arresting officer. The crime

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[4] "* * * there is now being concealed certain property, namely bookmaking records, wagering paraphernalia, including but not limited to, bet slips, betting markers, run down sheets, schedule sheets indicating the lines, adding machines, money, telephones, telephone address listings which are designed and intended for use as the means of committing criminal offenses in violation of Title 18, United States Code Section 1084, and violations of 441, 4412 and Section 7203 of the Internal Revenue Code.* * *" (Vol. 1, CT 17).

charged was the forgery of a check which the government had in its possession. The items seized were checks and income tax returns which were evidentiary only and not instrumentalities of the crime charged.

We have reviewed the authorities cited by the appellant. The case of *United States* v. *Clancy,* 276 F. 2d 617 (7 Cir. 1960); (reversed on other grounds in 365 U.S. 312), more nearly resembles the fact situation here. The search warrant described the property to be seized as in this case.[5]

In *Leahy* v. *United States,* 272 F. 2d 487, 491 (9 Cir. 1959), concerning a search, this court stated as follows:

> "* * * The revenue agents in the instant case seized an adding machine, a telephone, record books, receipts, pencils, pens, money and the keys to safety deposit boxes, as well as a number of rifles, shotguns and pistols. It is clear from the items seized that the search was specifically directed to the instrumentalities used in the commission of the crime of unlawfully engaging in the business of wagering. The records of an illicit business are instrumentalities of crime. Marron v. United States, 1927, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (officers incident to arrest may lawfully seize account books and papers used in carrying on the criminal enterprise.) Such were the records obtained in this case. The search was, therefore, a reasonable one."

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[5] "* * * divers records, to wit, books, memoranda, tickets, pads, tablets and papers recording the receipt of money from and the money paid out in connection with the operation of a wagering business on said premises, such files, desks, tables and receptacles for the storing of the books, memoranda, tickets, pads, tablets and papers aforesaid, and divers receptacles in the nature of envelopes in which there is kept money won by patrons * * * and divers other tools, instruments, apparatus, United States currency and records * * *". (276 F. 2d at 624).

The search warrant was valid and the court was correct in refusing to suppress the evidence obtained on the search.

III. *The Indictment.*

Counsel argues that there was a single violation under the statute, 18 USC 1084. This is not borne out by the record as we view it. Each call was a separate act of the defendant in using the telephone and would constitute a separate and distinct offense.

In construing a related statute to 18 USC 1084, the court in *United States* v. *Teemer*, 214 F. Supp. 952, 958 (N.D. W.Va. 1963), said:

> "* * * (T)he 'course of conduct' referred to in the * * * legislative history of setcion 1952, refers to the nature of the business promoted or facilitated—and not to the essence of the federal offense, which is 'travel'. The phrase seems to refer to the fact that the Act was designed to attack an entrenched operation rather than a sporadic poker game or floating crap game. No act of travel is to be deemed unlawful unless the enterprise is a continuing one; but once the continuity of the enterprise is established, any act or travel, * * * is a daily or regular event, and thus, perhaps, a 'continuing' activity. * * *"

Mitchell v. *United States*, 142 F. 2d 480 (10 Cir. 1944), was an appeal from a conviction of mail fraud. It was held that a continuing scheme once established may support additional charges of violation of the statute. Each act of mailing would constitute a separate and distinct offense once the scheme was established. That would be the case here, as was found in the Teemer case supra under 18 USC 1952.

IV. *Constitutionality of 18 USC 1084.*

Appellant urges that the statute is unconstitutional in that it is indefinite, vague and uncertain, and therefore violates the Fifth Amendment. In support of his argument that this statute is void for vagueness, appellant quotes language from the recent case of *Giaccio* v. *Pennsylvania,* 382 U. S. 399 (1966). The statute involved there was an 1860 law of Pennslyvania that permitted the taxing of costs against a defendant acquitted in a criminal case. A reading of that statute shows that it fixed no standards for its application. It was vague and uncertain.

In *Turf Center, Inc.* v. *United States,* 325 F. 2d 793, 795 (9 Cir. 1963), this court held 18 USC 1952 as not void for vagueness. That section is similar to and a companion section to 18 USC 1084.

> "A statute meets the standard of certainty required by the Constitution if its language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. * * * The fact that in some cases it may be difficult to determine the side of the line on which a particular fact situation falls is not sufficient reason to hold the language too ambiguous to define a criminal offense. * * *"

We do not consider the authorities cited by the appellant as sustaining his position that this statute is void or that it interferes with the right of free speech. The plain and unambiguous language used in the statute is entitled to its ordinary and reasonable interpretation. This statute meets the standard of certainty required by the Constitution.

V. *Sufficiency of the Evidence.*

A complete review of the record has been made. The evidence was detailed and not substantially disputed. The defendant presented no testimony. We are convinced that there was sufficient evidence to sustain the conviction of the defendant.

The judgment of conviction is affirmed.

Appendix C(a)

§ 1084. Transmission of wagering information; penalties

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable

notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored. Added Pub.L. 87-216, § 2, Sept. 13, 1961, 75 Stat. 491.

Appendix C(b)

AMENDMENT I—FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Appendix C(c)

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Appendix C(d)

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 895

CHARLES KATZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. After a non-jury trial in the United States District Court for the Southern District of California, petitioner was convicted on all counts of an eight-count indictment charging him with making telephone calls on eight different occasions transmitting wagering information between Los Angeles and Miami and Los Angeles and Boston (18 U.S.C. 1084). On June 21, 1965, petitioner was sentenced to pay a $300 fine (Tr. I, 61). The judgment of the court of appeals

affirming the conviction was entered on November 17, 1966. The petition for a writ of certiorari, filed on December 22, 1966, is out of time under Rule 22(2) of the Rules of this Court.

2. Before discussing the issues raised in the petition we believe the following circumstances should be brought to the Court's attention. On June 22, 1966, after the conviction in this case, petitioner was brought before a grand jury in the United States District Court for the Southern District of Florida which was investigating unlawful interstate wagering. After having claimed the privilege against self-incrimination with respect to questions about telephone calls from Los Angeles to Miami in February 1965 (in part the subject matter of the present conviction), petitioner was informed by the government and the court that, if he did answer questions, he would be immune from prosecution under 47 U.S.C. 409(*l*). Petitioner nevertheless refused to answer and was adjudicated in civil contempt. However, on November 30, 1966, after the affirmance of the judgment in this case by the Ninth Circuit, but before the petition for a writ of certiorari was filed, petitioner did testify, under a grant of immunity, before another grand jury in the Southern District of Florida. His testimony covered, *inter alia*, the conversations which formed the basis of the present indictment.

It is arguable that, under *Frank* v. *United States*, 347 F. 2d 486 (C.A.D.C.), petitioner acquired immunity in November 1966, not only from future prosecution, but from the effect of the present con-

viction as well. There the court held that the immunity conferred by Section 409(*l*) applied to a conviction pending on appeal. Even assuming *arguendo* that the *Frank* rule would also apply after affirmance on appeal but before expiration of the time for petitioning for certiorari, we believe that *Frank* was wrongly decided and should not be applied here.

In our view, the statutory immunity is no broader than the privilege against self-incrimination itself. In a case such as this one, it cannot be said that any testimony by the witness could incriminate him with respect to the offense in question, since he has already been convicted of that offense. As this Court stated in *Reina* v. *United States*, 364 U.S. 507, 514, immunity statutes need not "do more than protect a witness from future prosecutions." There it was held that a witness who was serving a sentence could not decline to testify under a grant of immunity on the ground that he was not granted a pardon on the unserved portion of his sentence. As that decision recognizes, the purpose of the immunity statutes is to assure a witness that neither his incriminating testimony nor any evidence derived therefrom will be used against him in a criminal trial. This purpose does not require that the immunity relate back to a previous conviction, even if pending on appeal or certiorari.[1] Therefore, we believe that petitioner's act of testifying in November 1966 is without effect upon the present case.

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[1] Of course, if the conviction is reversed on appeal, the immunity would apply to a retrial.

3. Petitioner's principal challenge is to the admissibility of evidence obtained by a recording device placed on the top of a bank of public telephone booths from which petitioner made calls (Tr. II, 6, 121). For about two weeks in February 1965, F.B.I. agents observed petitioner make telephone calls from a particular row of telephone booths in Los Angeles during certain hours on an almost daily basis (Tr. II, 6, 137). A check revealed that some of the calls were to a number in Massachusetts listed in the name of an individual known as a gambler (Tr. II, 6). Every day from February 19 through February 25, 1965, F.B.I. agents placed a recording device on the top of the bank of phone booths from which petitioner made his calls (Tr. II, 6, 121). Connected to the recorder were two microphones, which were taped to the outside of two of the booths[2] (Tr. II, 7, 122). Each day, as petitioner approached a certain spot about a block away from the telephones, agents in a radio car signaled the agents near the booths, who then attached the microphones. After petitioner had departed, the device was removed (Tr. II, 7, 126-127).[3] Tape recordings of petitioner's end of the conversations were obtained on all days except February 22 (when the recorder malfunctioned). They indicated

[2] The third booth was put out of order with the consent of the telephone company, which also gave its permission to the placing of the recorder and microphones (Tr. II, 7, 138).

[3] Despite these precautions, on one occasion a person entered the vacant booth while petitioner was making a call. Although the unknown person's voice was recorded, the recording was never played back (Tr. II, 140-141).

that petitioner was placing bets and receiving wagering information (Tr. II, 7).

The court of appeals ruled that the use of the recording device was legal and the tapes admissible in evidence under the authority of *Goldman* v. *United States*, 316 U.S. 129. In that case the Court upheld the admissibility of evidence obtained by a detectaphone placed by federal agents, stationed in an adjoining office, against the dividing wall of defendant's office. As in *Goldman*, the microphones used here were entirely outside the enclosure (a public telephone booth) in which petitioner's conversations took place.

The intrusion here was less substantial than in *Goldman*.[4] The agents took measures to ensure that no one, other than petitioner, using the booths petitioner frequented would have his conversation transcribed. Nor did they use the device with respect to petitioner until two weeks of surveillance and investigation indicated a strong likelihood that petitioner was using the telephones in question to violate the law.

Silverman v. *United States*, 365 U.S. 505, is not controlling here. There the Court held inadmissible evidence obtained by a "spike mike," which penetrated beyond the center of a party wall, made con-

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[4] One court has held that a public telephone booth is not a "constitutionally protected area" under the Fourth Amendment. *United States* v. *Borgese*, 235 F. Supp. 286 (S.D. N.Y.); cf. *Lanza* v. *New York*, 370 U.S. 139, 143-144. Whatever the validity of this ruling, it is at least clear that a public telephone booth is not generally considered as a private sanctuary, as is one's home or office.

tact with a heating duct and, in effect, made the duct "'a giant microphone, running through the entire house'" (365 U.S. at 509). Nor is there, as petitioner claims, any confusion with respect to the *Goldman* and *Silverman* decisions requiring their reconsideration by the Court. Where the lower courts have discerned no intrusion into a constitutionally protected area, they have followed *Goldman* and permitted evidence as to overheard conversations to be introduced. *Jones* v. *United States*, 339 F. 2d 419 (C.A. 5), certiorari denied, 381 U.S. 915 (heating panel removed in adjoining room; conversation overheard); *United States* v. *Pardo-Bolland*, 348 F. 2d 316 (C.A. 2), certiorari denied, 382 U.S. 944 (microphone taped over keyhole in adjacent hotel room and placed on floor on other side of common door); *Anspach* v. *United States*, 305 F. 2d 48 (C.A. 10) certiorari denied, 371 U.S. 826 (listening through double doors separating hotel rooms); *Corngold* v. *United States*, 367 F. 2d 1 (C.A. 9) ("scintillator" sensitive to radiation used in hallway outside defendant's apartment). Where, on the contrary, an invasion of a constitutionally protected area has occurred, the courts have followed *Silverman* and rejected the evidence obtained. *Clinton* v. *Virginia*, 377 U.S. 158; *Cullins* v. *Wainwright*, 328 F. 2d 481 (C.A. 5), certiorari denied, 379 U.S. 845 (microphone lowered down air shaft to level of defendant's apartment).

4. On the basis of the overheard conversations and other evidence, F.B.I. agents obtained a search warrant authorizing them to search petitioner's premises for "bookmaking records, wagering paraphernalia, including but not limited to, bet slips, betting mark-

ers, run down sheets, schedule sheets indicating the lines, adding machines, money, telephones, [and] telephone address listings * * *" (Pet. App. 22, n. 4).[5] Pursuant to the warrant, betting records were seized (Tr. II, 31-34, 210). Petitioner argues that the warrant was invalid, not only because founded on the evidence obtained from the recording device, but because it did not adequately describe the items to be seized (Pet. 8). This contention is without merit. The fact that the warrant mainly listed categories of things to be taken, rather than individual objects, does not render it invalid. Such categorization is inevitable in cases such as this, where the accused's particular method of keeping records could not be determined in advance. The warrant sufficiently identified the type of material to be taken. *Nuckols* v. *United States*, 99 F. 2d 353 (C.A.D.C.), certiorari denied *sub nom. Floratos* v. *United States*, 305 U.S. 626; *United States* v. *Clancy*, 276 F. 2d 617 (C.A. 7), reversed on other grounds, 365 U.S. 312. The fact that some improper items were taken[6] would not, as petitioner contends, render the lawfully seized items inadmissible. It is only when

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[5] The affidavit in support of this warrant, detailing all the evidence then gathered which led the agents to believe that petitioner was transmitting wagering information and bets in interstate commerce, appears at pages 18-19 of the Transcript, Volume I.

[6] On a motion to suppress, the court ordered some of the items taken during the search returned to petitioner on the grounds that they were immaterial to the charge against him or were "mere evidence" (Tr. II, 88-93).

seizable and unseizable matter are taken under an invalid (general) warrant or where the seizure is so widespread as to amount to a general search that material, though ordinarily seizable, becomes inadmissible. *Marcus* v. *Search Warrant*, 367 U.S. 717.

5. The contention (Pet. 9-10) that 18 U.S.C. 1084 is unconstitutionally vague because it applies only to those "engaged in the business of betting or wagering" is without merit. The fact that there might be borderline cases as to whether some particular person's activities are within the purview of the statute does not render its coverage impermissibly uncertain. *United States* v. *Petrillo*, 332 U.S. 1, 7; *Robinson* v. *United States*, 324 U.S. 282, 286. It is, of course, the government's burden to prove beyond a reasonable doubt that the accused is engaged in such business.

There is no interference with free speech in prohibiting the use of the facilities of interstate commerce to transmit "bets or wagers or information assisting in the placing of bets or wagers." "[I]t has never been deemed an abridgement of freedom of speech * * * to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language * * *." *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502. See also *American Communications Assn.* v. *Douds*, 339 U.S. 382; *In re Rapier*, 143 U.S. 110; cf. 18 U.S.C. 1341-1343 (mail fraud).

6. Petitioner contends that 18 U.S.C. 1084 defines a continuing offense so that the eight telephone calls which he was charged in separate counts with making

could not each be made a separate crime. Since the $300 fines imposed for each violation were not made cumulative, the issue is not presented in this case. In any event, it seems clear that, once it is established that petitioner was "engaged in the business of betting or wagering", each separate act of interstate transmission of bets or wagering information might be charged as a crime. *United States* v. *Cohen*, 35 F.R.D. 227, 231 (N.D. Calif.) (dictum); see also *United States* v. *Teemer*, 214 F. Supp. 952, 958 (N.D. W. Va.) (construing a related statute, 18 U.S.C. 1952).

7. The evidence against petitioner is summarized in the opinion below (Pet. App. 16-19). It was more than ample to sustain the verdict.

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 35

CHARLES KATZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

There were no reports of the trial court's decision.

The decision of the Court of Appeals for the Ninth Circuit has been reported at 369 F. 2d 130.

Jurisdiction

The judgment of the Court of Appeals was entered November 17, 1966. On March 13, 1967, certiorari was granted (87 S. Ct. 1021).

The jurisdiction of this Court is invoked pursuant to 28 USCA §1257 (3).

Questions Presented

1. Whether evidence obtained by attaching an electronic listening and recording device to the top of a public telephone booth used and occupied by the Petitioner is obtained in violation of the Fourth Amendment to the United States Constitution.

   A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

   B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.

2. Whether the search warrant used by the Federal Officers in the instant case violated the Fourth Amendment to the United States Constitution in that said warrant was (a) not founded on probable cause; (b) an evidentiary search warrant and (c) a general search warrant.

3. In what manner does the holding in *Frank* v. *United States,* 347 F. 2d 486 affect this case.

Constitutional Provisions Involved

Fourth Amendment, Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no

warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment, Constitution of the United States:

"No person shall be heard to answer for capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

Statement of the Case

On March 17, 1965, an eight-count indictment was filed against Petitioner, Charles Katz. Each count of the indictment charged a violation of Title 18, U.S.C., §1084 [interstate transmission of bets and wagers and information assisting in the placing of bets and wagers]. Each of said counts involved violations of §1084 on different dates or at different times on the same date. (Tr. 3-5.)[1]

Prior to the trial of the within matter, Petitioner filed a Motion to Suppress Evidence and for Return of Evidence, which motion was denied. Subsequently, Petitioner moved to dismiss the indictment, pursuant to Rule 12 of

[1] Page references are to the printed Transcript of Record.

the Federal Rules of Criminal Procedure, which motion was also denied.

Thereafter, Petitioner entered a plea of not guilty, and a trial by court, the Honorable Jesse Curtis, Judge Presiding, was held. On May 20, 1965, the court found Petitioner guilty on all counts as charged. Petitioner's motions for a new trial and for a judgment of acquittal were denied; whereupon, Petitioner was fined the sum of $300.00. (Tr. 1-2; 213-215.)

On November 17, 1966, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of conviction. (Tr. 222-231.)

On March 13, 1967, this Court granted a Petition for Writ of Certiorari. On May 22, 1967, the Petitioner's Motion to Proceed in Forma Pauperis was granted. (Tr. 232-233.)

Statement of the Facts

On February 4, 1965, agents of the Federal Bureau of Investigation commenced surveillance activities with respect to Petitioner. (Tr. 102.) This activity continued until February 25, 1965. In fact, Petitioner's activities only during the period from February 19 through February 25 formed the basis of the indictment in the instant case. (Tr. 3-5.)

On February 19, 1965, Agent Barron of the FBI observed Petitioner entering one of three phone booths located on the 8200 block of Sunset Boulevard in Los Angeles. On this date, Petitioner appeared to be making a telephone call and remained in the booth for approximately ten

minutes. Petitioner's conversation was overheard and recorded [and later transcribed] by means of a tape recorder which was placed on top of the middle booth. (Tr. 103.) One of the three booths was placed out of order by the FBI with the consent of the telephone company. (Tr. 112.) The recorder microphone was taped onto the booth and no part of the microphone physically penetrated the telephone booths. (Tr. 103-104.) The microphone was activated when Petitioner was a block away from the booth. (Tr. 106; 113.) The microphone was deactivated after Petitioner left the booth. (Tr. 106.) Apparently, anybody could use the booth while the recording equipment was operative; in fact, on February 23, 1965, a stranger did use the booth and his conversation was recorded. (Tr. 113-114.)

The admission into evidence of any of the conversations [recordings and transcripts] obtained by means of the tape recorder was objected to (Tr. 104; 107; 116); however, all of the transcripts made from the tape recordings were admitted into evidence. (Tr. 105; 116.)

On February 20, 1965, through February 25, 1965, inclusive, Petitioner was observed using the same phone booths and the agents of the FBI followed the same procedure of recording and transcribing his telephone conversations, although no tape recording was obtained on February 22, 1965, due to mechanical difficulties. (Tr. 114.) Petitioner was arrested immediately after leaving the telephone booth on February 25, 1965. (Tr. 115.)

A representative of the telephone company [the custodian of the records] testified that calls were placed on some of the dates in question to Boston, Massachusetts. (Tr. 123.)

FBI Agent La Rue was present when Petitioner was arrested. (Tr. 146.) Petitioner's apartment was searched pursuant to a warrant. Petitioner's objections that the evidence which was seized pursuant to the warrant was procured by means of an illegal taping of Petitioner's telephone calls and that the warrant under which the items were seized was too general and the search was exploratory, were overruled. (Tr. 147.) Agent La Rue testified that Petitioner told him that he had done nothing else other than handicap for the past 30 years. (Tr. 149.) Petitioner did not, however, say he had been betting for 30 years; in fact, Petitioner may have only said that he had been a handicapper for that length of time, and the word "handicap" appeared in the Agent's report. (Tr. 150-151.)

ARGUMENT

I.

Introduction

When the Petition for Writ of Certiorari was filed herein, counsel for Petitioner intended and hoped that this case would provide the vehicle for a re-examination by this Court of the dichotomy that had been permitted to develop in the area of the Fourth Amendment's proscription against unreasonable searches and seizures. This dichotomy had been caused primarily by two decisions of this Court—*Goldman* v. *United States,* 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322, and *Silverman* v. *United States,* 365 U.S. 505, 81 S. Ct. 679, 5 L. Ed.2d 734, and cases interpreting these two decisions. It was also the intention of

counsel, if the Writ were granted, to bring before this Court the whole subject of eavesdropping, particularly eavesdropping accomplished by the use of electronic and mechanical apparatus.[2] In this regard, counsel intended to examine the historical background of eavesdropping, the judicial decisions relating thereto, the effect of recent technological advancements and whether, in fact, electronic eavesdropping is an indispensable tool of law enforcement officers.

In *Berger* v. *New York,* 388 U.S. 41, 87 S. Ct. ——, 18 L. Ed.2d 1040, this Court, in striking down the New York permissive eavesdropping statute, greatly simplified the task of counsel herein by discussing in some detail the entire topic of electronic eavesdropping and particularly the subject matters set forth in the preceding paragraph hereof. No useful purpose would be served in reiterating this discussion. Accordingly, the portion of this brief relating to the subject of electronic eavesdropping will be directed solely to the *Goldman-Silverman* dichotomy and the ramifications thereof.

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[2] The use of the word "eavesdropping" is not intended as a word of art and includes the subject of "wiretapping", *i.e.*, electronic interception of telephone or telegraph messages.

II.

Whether Evidence Obtained by Attaching an Electronic Listening and Recording Device to the Top of a Public Telephone Booth Used and Occupied by the Petitioner Is Obtained in Violation of the Fourth Amendment to the United States Constitution.

A. Whether a Public Telephone Booth Is a Constitutionally Protected Area So That Evidence Obtained by Attaching an Electronic Listening Recording Device to the Top of Such a Booth Is Obtained in Violation of the Right to Privacy of the User of the Booth.

B. Whether Physical Penetration of a Constitutionally Protected Area Is Necessary Before a Search and Seizure Can Be Said to Be Violative of the Fourth Amendment to the United States Constitution.

In *Goldman, supra,* the Federal law enforcement officers placed a detectaphone against the wall of a room which the defendant was occupying. This Court held that the conversations that were intercepted by use of this device were admissible and that no Fourth Amendment violation had occurred. The basis of the Court's decision was that the action by the agents did not constitute a physical trespass into the area occupied by the defendant. A strong dissent was filed by Mr. Justice Murphy wherein he stressed the fact that the primary inquiry under the Fourth Amendment should be whether an individual's right to privacy had been invaded, not whether a physical trespass had occurred.

On Lee v. *United States,* 343 U.S. 747, 72 S. Ct. 967, 96 L. Ed. 1270, followed *Goldman* and is really significant only

for the reason that Mr. Justice Douglas, in his dissenting opinion, admitted that he had erred in voting with the majority in *Goldman*. (343 U.S. 747, 762.)

In *Silverman* v. *United States*, *supra*, the Court unanimously held that evidence procured by penetrating a spike mike through the wall of petitioner's home so that it touched the heating ducts therein was inadmissible. In *Silverman*, this Court chose not to re-examine *Olmstead* v. *United States*, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944,[3] or *Goldman* v. *United States*, *supra*, deciding rather to base its decision on the fact that there had been "an actual intrusion into a constitutionally protected area." (365 U.S. 505, 512.) The following significant language also appeared in *Silverman*:

> "Here, by contrast, the officers overheard the petitioners' conversations only by usurping part of the petitioners' house or office—a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent. *In these circumstances we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law.*" (Citations omitted.) (365 U.S. 505, 511.) (Emphasis added.)

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[3] In *Olmstead*, which preceded *Goldman*, the Court held admissible evidence obtained by a wire tap. The decision was based on a literal interpretation of the Fourth Amendment, *i.e.*, that a wire tap was neither a search nor a seizure. (277 U.S. 438, 464.)

After *Silverman,* much confusion existed as to whether this Court had abandoned the physical trespass test enunciated in *Goldman* or whether *Silverman* represented the new philosophy of the Court. The confusion was to some extent caused by the statement in *Silverman* that "We find no occasion to re-examine Goldman here, but we decline to go beyond it, by even a fraction of an inch." (365 U.S. 505, 512.)

The confusion was deepened by the subsequent decision in *Lopez* v. *United States,* 373 U.S. 427, 83 S. Ct. 1381, 10 L. Ed.2d 462, wherein the Court was unwilling to reconcile the apparent conflict between *Goldman* and *Silverman.* In one breath the Court spoke in terms of "privacy" (373 U.S. at p. 438), while in the next breath it talked about an "unlawful physical invasion" (373 U.S. at p. 439). The only language to be found in *Lopez* which even resembles an attempt at reconciliation is the following:

> "It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area." (373 U.S. 427, 438-439.)

That the lower courts continue to be preoccupied with the physical trespass test can be discerned by reading such cases as *Cullins* v. *Wainwright,* 328 Fed. 2d 481 (5th Cir. 1964). In this case, the law enforcement officers lowered a microphone down an airshaft which was entirely surrounded by the interior wall of the apartment in which the defendant resided. The microphone was wired to a recording and listening device operated by the officers. The information intercepted was used in an affidavit in support of a search warrant and a subsequent search and

seizure was made of gambling paraphernalia. The Court held that an illegal search and seizure had occurred, since the facts of the case were more closely analogous to *Silverman* than *Goldman*.

In a sense, the foregoing brief dissertation concerning the judicial development of the law of search and seizure in the eavesdropping area is of academic importance only. Whatever doubts that may have once existed, it is now clear that the recent decisions of this Court unequivocally indicate that the primary concern of the Fourth Amendment is the protection of the individual's right to privacy. This was clearly expressed in *Warden, Maryland Penitentiary* v. *Hayden*, 387 U.S. 294, 87 S. Ct. ——, 18 L. Ed.2d 782, and reaffirmed in *Berger* v. *New York, supra*, and *Camara* v. *Municipal Court*, 387 U.S. 523, 87 S. Ct. ——, 18 L. Ed.2d 930. In *Warden*, this Court stated:

> "... We have recognized that the principal object of the Fourth Amendment is the *protection of privacy* rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts. See Jones v. United States, 362 U.S. 257, 266; Silverman v. United States, 365 U.S. 505, 511. This shift in emphasis from property to privacy has come about through a subtle interplay of substantive and procedural reform ...." (18 L. Ed.2d 782, 790.) (Emphasis added.)

See also *Griswold* v. *Connecticut*, 381 U.S. 79, 85 S. Ct. 1678, 14 L. Ed.2d 510.

Assuming the undeniable premise that the primary concern of the Fourth Amendment is the individual's right

to privacy, it can at once be seen that the inquiry as to whether or not a physical trespass has occurred is no longer relevant in discussing a search and seizure issue and, to the extent that *Goldman* v. *United States, supra,* stands for such a proposition, it must be overruled. If there has been an actual invasion or an attempt to intrude into a constitutionally protected area, a person's right to privacy has been violated and the fact that there was or was not physical penetration of that area is irrelevant. The crucial inquiry as applied to the instant case is, therefore, whether a public telephone booth is a constitutionally protected area so that an interception of Petitioner's calls while an occupant thereof constituted an invasion of his constitutionally protected right to privacy.

Before discussing this question, it must first be observed that there can be no real doubt that Petitioner herein has the requisite standing to attack the alleged constitutional infringement, since he has been "indisputably affected by it." *Berger* v. *New York,* 18 L. Ed.2d 1040, 1050; see also *Jones* v. *United States, supra.*

This Court has apparently never had the occasion to pass on the issue of whether a public telephone booth is a constitutionally protected area. Nor has this Court delineated with specificity the test for determining whether a particular area is constitutionally protected. Perhaps *Lanza* v. *United States,* 370 U.S. 139, 82 S. Ct. 1218, 8 L. Ed.2d 384, represents the closest that this Court has come to discussing this subject. In *Lanza,* wherein it was held that a public jail was not a constitutionally protected area, the Court stated:

> "Yet, without attempting either to define or to predict the ultimate scope of Fourth Amendment pro-

tection, it is obvious that a jail shares none of the *attributes of privacy* of a home, an automobile, an office, or hotel room." (370 U.S. 139, 143.) (Emphasis added.)

When the now discredited physical trespass theory is abandoned in favor of one stressing the right to privacy, it is possible to suggest a workable test to be employed in determining whether or not a specific area is protected by the Fourth Amendment. This test merely turns on the answer to the question: "Does the area in question have the 'attributes of privacy?'" (*Lanza* v. *New York, supra*) or, said in another way, "Would the average reasonable man believe that the person whose conversation had been intercepted intended and desired his conversation to be private?" Under this test the degree of privacy afforded by a facility would be one criterion in determining the degree of privacy protected. For example, a conversation held in a telephone booth having a door would be entitled to more privacy, and thus more constitutional protection, than a conversation held in an open booth in a crowded building or area.

When examined in light of this proposed test, there is little room for doubt that a public telephone booth with a door [as in the instant case] is and should be a constitutionally protected area. In using the booth, a person, in return for paying a set toll, expects and intends his conversation to be unmonitored and private and further expects to be in complete control of the degree of privacy his conversation will have. Since the protection of the Fourth Amendment has been held by this Court to include a business office (*Gouled* v. *United States,* 255 U.S. 298, 41 S. Ct. 261, 65 L. Ed. 647), a store (*Davis* v. *United States,*

328 U.S. 582, 66 S. Ct. 1256, 90 L. Ed. 1453), a hotel room (*United States* v. *Jeffers,* 342 U.S. 48, 72 S. Ct. 93, 96 L. Ed. 59), an automobile (*Henry* v. *United States,* 361 U.S. 98, 80 S. Ct. 168, 4 L. Ed.2d 134), and an occupied taxicab (*Rios* v. *United States,* 364 U.S. 253, 80 S. Ct. 1431, 4 L. Ed.2d 1688), it would be unreasonable to suggest that any less protection should be afforded to the user of a closed door public telephone booth. Surely he has the same right to exclusive control and use as does the taxicab occupant.

Several lower courts have had the occasion to pass on the issue herein presented. In *United States* v. *Borgese,* 235 Fed. Supp. 286 (S.D.N.Y. 1964) the court held that a public telephone booth was not a constitutionally protected area. However, in *United States* v. *Stone,* 232 Fed. Supp. 396 (N.D. Tex. 1964) and *United States* v. *Madison,* 32 U.S.L. Week 2243 (D.C. Ct. Gen. Sess. 1963) a contrary, and it is submitted correct, decision was reached. Because of the excellent manner in which the Court in *Stone* analyzed the matter, this Court's indulgence is desired in setting forth in some detail a portion of that decision:

> "Going back to the founding of this country it is clear that individual privacy was one of the strongest single influences that guided the founders of this country in the establishment of a new nation and the adoption of the Bill of Rights.
>
> "Privacy of a protected area was invaded only by an actual physical intrusion. But today electronic devices without physical presence enables an intrusion upon the air, light and sound waves of a person's property as real as any physical trespass.
>
> "But fundamental rights protected by the Bill of Rights cannot become outdated by technological de-

velopments. Sustaining this position the Supreme Court stated in Village of Euclid v. Ambler Realty Company, 272 U.S. 365, at page 387, 47 S. Ct. 114, at page 118, 71 L. Ed. 303 (1926):

" 'while the meaning of the constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise.'

"In the light of technological improvements it is clear that an electronic device placed in a protected area by government agents without the knowledge of the defendant and transmitting a telephone conversation of defendant is as much a physical trespass and violation of the right to privacy as is the making of an unlawful physical entry, and overhearing the conversation under such circumstances is a violation of the Fourth Amendment.

"With respect to whether the admission of evidence secured through an electronic device also violates the Fifth Amendment, Judge Washington in a dissenting opinion in Silverman, 275 F.2d 179 reasoned that:

" 'eavesdropping of the kind which occurred here * * * does violate * * * our fundamental concept of ordered liberty, as embodied in the due process clauses of the Fifth and Fourteenth Amendments.' [Silverman v. United States, 107 U.S. App. D.C. 144, 275 F.2d 173.]

"In the recent case of Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed.2d 653, Justice Brennan ap-

proved the following statements in Boyd v. United States, supra, that

> "'Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony * * * to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of [the Fourth and Fifth Amendments].' and in Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed.2d 1081, 84 A.L.R.2d 933 that
>
> "'We find that as to the Federal Government the Fourth and Fifth Amendments * * * do enjoy an 'intimate relation' in their perpetuation of 'principles of humanity and civil liberty [secured] * * * only after years of struggle'. Bram v. United States, 1897, 168 U.S. 532, 543-544 [18 S. Ct. 183, 187, 42 L. Ed. 568].
>
> "It is clear that the use of defendant's conversation in a criminal case under the circumstances in this case is within the condemnation of the Fifth as well as the Fourth Amendment . . . ." (232 Fed. Supp. 396, 399-400.)

In *Berger* v. *New York, supra,* this Court elaborated upon certain factors which might turn an otherwise valid search into an illegal one. Two of these factors were the imprecise and indiscriminate monitoring of conversations and prolonged or a series of monitorings. Both of these factors were present in the instant case. Not only was the surveillance of the Petitioner conducted over a period of three weeks [although activities during only a one week period formed the basis of the indictment], but a conversation, and therefore the privacy, of a complete stranger

was intercepted. (Tr. 113-114.) Thus, even assuming arguendo [although vehemently denying] that a public telephone booth is not a constitutionally protected area, the search in this case was unreasonable under the Fourth Amendment in any event, since not even the protections of the statute in *Berger, supra,* were present in this case.

III.

Whether the Search Warrant Used by the Federal Officers in the Instant Case Violated the Fourth Amendment to the United States Constitution in That Said Warrant Was (a) Not Founded on Probable Cause; (b) an Evidentiary Search Warrant; and (c) a General Search Warrant.

Before examining in some detail the nature of the search warrant involved in the instant case, one very significant point must be mentioned. The affidavit for search warrant involved herein (Tr. 12-14) specifically states:

> "On February 19, 20, 21, 23 and 24, 1965, Charles Katz was observed by me and fellow Special Agents to enter either one of two public phone booths located at 8210 Sunset Boulevard, Hollywood, California, which have phone numbers OL 4-9275 and OL 4-9276.
>
> "From these booths Charles Katz made daily station to station telephone calls to Boston, Massachusetts, telephone number 884-1733. His conversations were recorded by taping microphones on the outside of the phone booths daily. I have listened to the recordings of his conversations and in his conversations he daily received the basketball line and made wagers with the person using the telephone number he was calling.

"On February 23 and 24, 1965, Charles Katz from the described booths called Miami Beach telephone number JE 4-0976 and on February 24, 1965, he made sports bets on the Duquesne and Temple basketball games to a party on the Miami number. He used the following language, 'Give me Temple 10½ for a nickel and give me Duquesne 7½ for a nickel.'

"From my experience in investigating violations of the Federal Gambling Statutes I am aware that the above language construed the placing of bets."

It must be conceded by Respondent that a substantial portion of the information recited in the agent's affidavit in support of the search warrant was obtained by him through the use of an electronic eavesdropping device. It is patently clear that if, as is contended by Petitioner, the information was obtained in violation of the Fourth Amendment, such information could not be utilized to establish "probable cause" for the search warrant. This necessarily follows since the warrant would be the "fruits of the poisonous tree." *Silverthorne Lumber Company* v. *United States,* 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319. Assuming that the information was obtained in violation of the Fourth Amendment and if the affidavit was not sufficient for "probable cause" absent such information, the warrant must be declared invalid and all evidence seized thereby must be held inadmissible.

Assuming arguendo that the affidavit was sufficient for "probable cause," it remains to be seen whether the warrant itself was valid. The warrant authorized a search for the following:

> ". . . bookmaking records, wagering paraphernalia, including but not limited to, bet slips, betting markers, run-down sheets, schedule sheets indicating the lines, adding machines, money, telephones, telephone address listings, ..." (Tr. 11.)

It is respectfully submitted that the foregoing language of the warrant authorized a search for evidence in violation of Rule 41, Fed. Rules Crim. Proc.

It may be contended that a contrary conclusion is dictated by this Court's recent decision in *Warden, Maryland Penitentiary* v. *Hayden, supra,* wherein it was held that the fact that "mere evidence" was seized by the authorities during an otherwise valid arrest and search did not make the evidence seized inadmissible. If, in fact, *Warden* does dictate this conclusion, a further discussion of the subject would seem unnecessary. It is because Petitioner contends that the decision in *Warden* did not foreclose the issue here under discussion that further inquiry into the question will be made.

Counsel for Petitioner have had the occasion to discuss between themselves and their colleagues the meaning and applicability of *Warden,* both as to the law of search and seizure in general and to the facts of this case in particular. Some of these colleagues have adopted the position that the *Warden* decision means that evidentiary items may now be seized under a search warrant as long as these items are specifically listed in the warrant. If, in fact, this is the true meaning of *Warden,* counsel for Petitioner herein respectfully submit that the decision is irreconcilable with Rule 41, Fed. Rules Crim. Proc.

Although the Fourth Amendment would seem to sanction an evidentiary search if the items to be seized are particularly described (*Warden* v. *Hayden, supra*), Rule 41 contains no such permission or authority. Thus, by enacting Rule 41 Congress obviously intended to and did make the scope of a search pursuant to a search warrant more restrictive than that permitted by the Constitution, at least insofar as the Federal Courts are concerned. It might be remembered that similar action was taken by Congress after this Court's decision in *Olmstead* v. *United States, supra.* Although *Olmstead* held wire tap evidence admissible under the Fourth Amendment, Congress enacted Title 47 U.S.C. §605 which made wire tapping an illegal activity. Subsequently, this Court in the *Nardone* Cases, 302 U.S. 379, 58 S. Ct. 275, 82 L. Ed. 314, and 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307, held that wire tap evidence was inadmissible in Federal prosecutions.

Irrespective of the validity of the foregoing analysis, it is respectfully submitted that *Warden* is distinguishable from the instant case. First, *Warden* involved a warrantless search [whereas a search warrant is involved herein] and therefore, the provisions of Rule 41 did not apply. Second, *Warden* involved a situation where the search was made while the officers were in "hot pursuit" of a suspected criminal. If the holding in *Warden* is held applicable to the instant case, this Court will be required to declare that the expression of Congress in Rule 41 is too narrow a construction of Fourth Amendment rights and that Rule 41 is somehow invalid. Further, this Court will be required to overrule all prior cases holding that a general or evidentiary search warrant is invalid. It is respectfully submitted that the Court should do neither. Additionally, to

apply the rationale of *Warden* to this case would be to totally and completely disregard that portion of the Fourth Amendment which provides:

> ". . . And no warrants shall issue but upon reasonable cause, supported by oath or affirmation, and *particularly describing* the place to be searched and the persons or things to be seized." (Emphasis added.)

Fed. Rules Crim. Proc., Rule 41 provides in its pertinent parts as follows:

> "(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property:
>
> "(1) Stolen or embezzled in violation of the laws of the United States; or
>
> "(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense."

It is significant to note that nowhere does Rule 41 authorize a search for evidentiary matter. Either *Warden* must be held inapplicable to the warrant involved in this case or Rule 41 must fall.

Further, if *Warden* is held to validate the warrant involved in this case, all prior decisions of this Court striking down general and exploratory searches under the guise of a search warrant must be overruled. See, e.g., *Marron* v. *United States,* 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 231; *Stanford* v. *United States,* 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed.2d 431; *Boyd* v. *United States,* 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746; *Gouled* v. *United States, supra;* and

Aguilar v. *Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed.2d 723. The following language set forth in *Marron* and cited in *Stanford* could not possibly be considered good law if *Warden* applies to the warrant involved herein:

> "The requirement that warrants shall particularly describe the thing to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." (375 U.S. 192, 196.)

Interestingly enough, the above-quoted language was cited with approval in *Berger* v. *New York, supra,* at p. 1052.

If, as is contended by Petitioner, the warrant involved in this case is to be governed by the long standing rules of law that have been enunciated by this Court [see decisions cited in preceding paragraph], then the provisions of this warrant must be further examined to determine whether or not they comport with these rules of law.

There can be little doubt that the warrant involved in this case authorized a search in violation of Rule 41 and the above cited cases. None of the items specified in the warrant were contraband or instrumentalities of the crime herein involved. Additionally, the warrant contained no specifics; rather, it was directed at items which customarily are found in the possession of gamblers or bookmakers. Further, the warrant was also directed at items which are commonly in the possession of every citizen of this country [*e.g.,* money, telephones, telephone address listings, etc.]. As such, it was a general warrant which au-

thorized a search for non-specified evidence. Such a warrant violates both the Fourth and Fifth Amendments to the United States Constitution.

Even if the warrant involved in the instant case could by some stretch of the imagination be held to be sufficiently specific, it is clear that the items seized by the officers went far beyond whatever specificity is contained in the warrant. A look at the inventory of the items seized (Tr. 14-16) discloses that numerous items were seized which were not described in the warrant and which were not contraband [e.g., 148 yellow, legal size sheets of lined paper; 1 copy 1964 Inside Football; newspaper clippings captioned "College Basketball Standings"; registration card issued by Las Vegas Police Department, #A-44612; newspaper clipping starting with "The expert: . . ." and ending with "games"; sheet of white, heavy paper with red handwriting; large brown envelope containing 7 copies of Sports Journal; copy of Basketball Year Book 1965]. Since the officers exceeded the authority granted to them in the warrant, it is respectfully submitted that the entire search must be invalidated, for the reason that the validly seized items cannot be severed from the invalidly seized items. The mass seizure of a person's private papers and property is offensive to the Fourth Amendment. *Marcus* v. *Property Search Warrants,* 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed.2d 1127.

IV.

If the Holding in Frank v. United States, 347 F.2d 846, Is Applicable to the Instant Case, Then Petitioner Is Entitled to a Reversal of His Conviction and This Proceeding Would Be Rendered Moot.[4]

After Petitioner's conviction in the instant case, and while the matter was pending on appeal in the Court of Appeals, Petitioner was subpoenaed before the Federal Grand Jury at Miami, Florida. Petitioner was granted immunity in connection with his testimony before the Grand Jury pursuant to Title 47 United States Code §409(1). Whereupon, Petitioner was questioned before the Grand Jury concerning the same subject matter which formed the basis of his conviction in the instant case. When Petitioner refused to answer any of the questions propounded to him before the Grand Jury, he was committed to the custody of the United States Marshal by Chief United States District Judge David W. Dyer until he complied with the order from the Court directing him to answer the questions propounded. This commitment, which was made on June 24, 1966, was stayed until June 27, 1966, pending application for a stay to the United States Court of Appeals for the Fifth Circuit.

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[4] The facts presented in connection with this argument were basically taken from the STIPULATION OF FACTS which was executed by Petitioner's counsel and counsel for the Government in connection with the Motion for Remand. If the facts as recited by Petitioner are incorrect in any substantial particular, Petitioner respectfully requests the Government to set forth the correct facts, all of which are in its possession.

On June 27, 1966, Circuit Judge J. Minor Wisdom stayed the order of commitment until the regularly constituted panel of the United States Court of Appeals for the Fifth Circuit had an opportunity to consider a motion for a stay. On July 7, 1966, the regularly constituted panel of the said Court of Appeals dissolved the aforesaid temporary stay and denied the Petitioner's motion for stay of commitment. On July 8, 1966, Chief United States District Court Judge David W. Dyer entered an order directing the United States Marshal to forthwith take into custody and incarcerate Petitioner in accordance with the order previously made on June 24, 1966. On July 9, 1966, Petitioner was taken into custody by the United States Marshal and incarcerated in the Dade County Jail, Dade County, Florida.

After Petitioner had served some time in jail, the particular Grand Jury before which Petitioner had been called to testify dissolved. Consequently, Petitioner was released from jail. *Shillitani* v. *United States*, 384 U.S. 364, 86 S. Ct. 1531, 16 L. Ed.2d 622.

Subsequently, a new Grand Jury was formed and Petitioner was again subpoenaed to appear before it. On this occasion, the previous grant of immunity still appertaining, Petitioner answered the questions propounded to him.

After he had testified before the Grand Jury as aforesaid, and on or about September 26, 1966, Petitioner, by and through his counsel, moved the Ninth Circuit Court to remand the within matter to the District Court for the purpose of permitting Petitioner to move for a new trial on the ground of newly discovered evidence. The newly discovered evidence related to Petitioner having testified before the Grand Jury, after having been granted immunity as aforesaid. It was and is Petitioner's contention that, by

so testifying after having been granted immunity, a reversal of his conviction was mandatory. A copy of Petitioner's NOTICE OF MOTION AND MOTION FOR REMAND FOR THE PURPOSE OF MOVING FOR A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE; AFFIDAVIT AND POINTS AND AUTHORITIES is attached hereto as Appendix "A".

On September 30, 1966, the United States Court of Appeals for the Ninth Circuit issued its order requesting "that each side file at or before the time set for hearing the argument, *i.e.*, October 7, 1966, such affidavits, transcripts (if any there be), (1) to establish whether or not appellant was convicted with respect to the matter about which the testimony was subsequently compelled; and (2) of any further proceedings (if any there be) by any party in Frank v. United States, 347 F.2d 486, subsequent to July 30, 1965." A copy of this order is attached hereto as Appendix "B".

October 7, 1966, the Court of Appeals for the Ninth Circuit issued its order denying Petitioner's Motion for Remand. A copy of this order is attached hereto as Appendix "C".

Insofar as the issue raised by the preceding facts is concerned, this case is identical to the case of *Frank* v. *United States*, 347 F.2d 486, *supra*. In *Frank*, the Court, quoting from the Government's Reply Brief, set out the facts as follows:

> "'After appellant Angelone was tried, convicted and sentenced, he was called upon to testify before a Grand Jury. The Grand Jury was investigating other crimes and the crime in the instant case so far as the facts concerned other suspects. Appellant Angelone refused

to testify on grounds of self-incrimination. He was compelled to testify under the immunity statute, 47 U.S.C. 409(L).'"

Based on the foregoing facts, the defendant Angelone contended that his conviction had been mooted and was required to be set aside. The Circuit Court so held. It is respectfully submitted that the same holding is required in the instant case wherein the facts which gave rise to the application of the *Frank* doctrine are undisputed and identical to those in *Frank*.

The statute under which Petitioner herein was granted immunity (48 Stat. 1097 (1934), 47 U.S.C. §409(L) (1958)) provides in its pertinent parts as follows:

> "No individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying."

Applying this statute to the facts before it, the Court in *Frank* stated:

> "[5] Under this language Angelone may not be 'subjected' to any penalty * * * for or on account of any transaction, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify * * *. Therefore he may not be penalized in the present case since, as we are now advised, his compelled testimony concerned matters

related to his conviction which is here on appeal. The United States points out, however, that the conviction had already occurred, and that the immunity statute does not apply to any penalty that may result from his appealed conviction because such penalty cannot be attributable to his testimony as given before the grand jury. We think this is too narrow a construction of the immunity statute and is inconsistent with the 'Policies of the Privilege' as most recently described by the Supreme Court. Murphy v. Waterfront Comm'n, 378 U.S. 52, 84 S. Ct. 1594, 12 L. Ed.2d 678.

"[6] While we are not bound to construe literally the language of immunity if to do so would run counter to the intent or purpose of Congress, we have no reason to decide that that intent or purpose was other than to permit an exchange of a particular conviction, such as Angelone's, for the larger benefit believed to reside in compelling his self-accusatory testimony. Congress has not sought to enable the government to obtain both such compelled testimony and a conviction related thereto which is either not yet obtained or if obtained is pending on appeal. Congress left the choice to the executive officials administering the criminal law, subject to District Court approval. Compelling one to give testimony which, except for the grant of immunity, is self-incriminating sacrifices the power to penalize the person granted the immunity if he has been convicted with respect to the matters about which the testimony is compelled and his appeal from the conviction is pending when such testimony is given. It probably will not be questioned that should such a conviction be reversed the intervening immunity would

preclude a subsequent re-trial. But if the conviction is affirmed, the appellant is 'subjected to * * * penalty' not only by the previous conviction but by the subsequent affirmance.

"....

"To repeat, the government may not convict a person and then, pending his appeal, compel him to give self-accusatory testimony relating to the matters involved in the conviction. Any other construction of the statute would lead to such potential abuse as to preclude such construction if it may reasonably be avoided consistently with the Congressional purpose. Our construction and application of the statute we think coincides with that purpose. Piemonte v. United States, 367 U.S. 556, 81 S. Ct. 1720, 6 L. Ed.2d 1028, is not to the contrary. No appeal from the conviction was there pending. Moreover, the case involved contempt of court for refusing to obey the court's order. No question as to the possible mooting of the previous conviction was presented or decided." (347 F.2d 486, 490-91.)

If the rationale in *Frank* is correct, then a reversal of Petitioner's conviction is required. A contrary result would in effect permit the law enforcement officers to reap the benefits of the immunity statute [i.e., Petitioner's testimony] without suffering the corresponding detriment [i.e., the inability to use the testimony against the Petitioner].

If, contrary to the suggestion by the Court in *Frank*, Petitioner's Grand Jury testimony could be used against him on a re-trial of the instant conviction, the immunity statute would indeed be rendered meaningless and Peti-

tioner would certainly suffer a "penalty" by being deprived of his Fifth Amendment rights. Petitioner seriously doubts that the Government would ever adopt such a position. It would be anomalous to hold that any less a "penalty" is imposed upon a person granted immunity if his conviction is affirmed on appeal. The obvious intent and purpose of the immunity statute is to afford to the defendant a *quid pro quo* for relinquishing his Fifth Amendment rights. The defendant would be deprived of his *quid pro quo* if he is forced to waive this right without deriving any benefit therefrom.

Further, if *Frank* is not upheld, the Government would be given a very unfair advantage for the following reason. Not only will the Government have its conviction affirmed on appeal, but the Government will also be able to derive the benefit of the defendant's testimony before the Grand Jury [immunity having been given while the case was on appeal], which testimony would not have been available in the trial court unless the Government gave the defendant immunity, thereby forsaking prosecution of him. In effect, if *Frank* is overturned, the Government will, proverbially speaking, "have its cake and eat it too."

Conclusion

It is respectfully submitted that the holding of the Court in *Frank* v. *United States* requires an automatic reversal of Petitioner's conviction herein. Nevertheless, because of the extreme importance of the Fourth Amendment issues presented by this case, Petitioner herein respectfully prays the Court to make a determination on these issues.

Respectfully submitted,

MARKS & SCHNEIDER
BURTON MARKS
HARVEY A. SCHNEIDER

Counsel for Petitioner

APPENDICES

APPENDICES

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 20648

UNITED STATES OF AMERICA,

Plaintiff and Respondent,

—v.—

CHARLES KATZ,

Defendant and Appellant.

Notice of Motion and Motion for Remand for the Purpose of Moving for a New Trial on the Ground of Newly Discovered Evidence; Affidavit and Points and Authorities

BURTON MARKS
8447 Wilshire Boulevard
Suite 217
Beverly Hills, California
(213) 653-4141
Attorney for Appellant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 20648

UNITED STATES OF AMERICA,
Plaintiff and Respondent,

—v.—

CHARLES KATZ,
Defendant and Appellant.

---

1) NOTICE OF MOTION FOR REMAND FOR THE PURPOSE OF MOVING FOR A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE;

2) MOTION FOR REMAND FOR THE PURPOSE OF MOVING FOR A NEW TRIAL BASED ON THE GROUND OF NEWLY DISCOVERED EVIDENCE;

3) AFFIDAVIT OF BURTON MARKS IN SUPPORT OF THE MOTION FOR REMAND FOR THE PURPOSE OF MOVING FOR A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE;

4) POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR REMAND FOR THE PURPOSE OF MOVING FOR A NEW TRIAL BASED ON THE GROUND OF NEWLY DISCOVERED EVIDENCE.

NOTICE OF MOTION FOR REMAND FOR THE PURPOSE OF MOVING FOR A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE

TO THE UNITED STATES OF AMERICA, PLAINTIFF AND RESPONDENT, AND ITS ATTORNEY MANUEL L. REAL:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the Defendant and Appellant CHARLES KATZ by and through the undersigned will bring the following motion for remand for the purpose of moving for a new trial based on the ground of newly discovered evidence on for hearing before the above entitled Court in the United States Courthouse, 312 N. Spring Street, Los Angeles, California on Friday, October 7, 1966, at 9:30 a.m., or as soon thereafter as counsel can be heard.

SEPTEMBER 26, 1966

/s/ BURTON MARKS
Burton Marks
Attorney for Appellant

MOTION FOR REMAND FOR THE PURPOSE OF MOVING FOR A NEW TRIAL BASED ON THE GROUND OF NEWLY DISCOVERED EVIDENCE

Defendant and Appellant CHARLES KATZ moves for an order granting his motion for remand for the purpose of moving for a new trial based on the ground of newly discovered evidence for the reasons set forth in the Affidavit of Burton Marks and Points and Authorities in Support of Motion attached hereto.

SEPTEMBER 26, 1966

/s/ BURTON MARKS
Burton Marks
Attorney for Appellant

AFFIDAVIT OF BURTON MARKS IN SUPPORT OF MOTION FOR REMAND FOR THE PURPOSE OF MOVING FOR A NEW TRIAL BASED ON THE GROUND OF NEWLY DISCOVERED EVIDENCE

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

I, Burton Marks, depose and say:

I am an attorney at law duly licensed to practice in the State of California and before the United States District Court, this Honorable Court and the Supreme Court of the State of California and am the attorney for Appellant CHARLES KATZ.

That I am informed and believe and thereon state that Appellant CHARLES KATZ subsequent to his conviction in the United States District Court, was granted immunity by the United States Department of Justice pursuant to the provisions of Title 47, United States Code, Section 409(1) so that he could testify in a Federal trial in the State of Florida. (A letter advising the Court of this fact was previously sent September 9, 1966.)

It is the opinion of this Affiant, based on the case of *Frank* v. *U.S.*, 347 Fed 2d 486, (C.A., B.C., 1965) that the fact that Mr. Katz was granted immunity constitutes newly discovered evidence which materially affects the Appellant's rights in this case and the pending appeal.

It is respectfully requested that this Court remand the within case to the United States District Court for the purpose of that court reviewing evidence relative to this grant of immunity.

SEPTEMBER 26, 1966

/s/ BURTON MARKS
Burton Marks

BURTON MARKS being first sworn under oath, presents that he has subscribed to the above Affidavit and does state that the information therein is true and correct.

/s/ BURTON MARKS
Burton Marks

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 26TH DAY
OF SEPTEMBER, 1966

/s/ LINDA BERRY
Notary Public in and for
Los Angeles County

My commission expires:

November 4, 1968

Points And Authorities In Support Of Motion For Remand For The Purpose Of Moving For A New Trial On The Ground Of Newly Discovered Evidence

I

Motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case.

Federal Rules of Criminal Procedure, 18 U.S.C.A., Rule 33

II

The purpose of the above cited Rule 33 is to permit the hearing of the motion for new trial on the ground of newly discovered evidence, although an appeal is pending, is to expedite the proceedings in that the granting of such motion can be made only upon a remand of the case to the trial court.

Rakes v. *U.S.*, C.C.A., Va. (1947), 163 Fed 2d 771.

III

The conviction of a defendant who testifies, after having been given immunity by the government pursuant to Title 47, U.S.C. §409(1), must be reversed and the defendant cannot be penalized or punished for that conviction.

Frank v. *U.S.*, 347 Fed 2d 486 (1965)

Respectfully submitted,

/s/ Burton Marks
Burton Marks

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within action; my business address is 8447 Wilshire Boulevard, Beverly Hills, California. On September 26, 1966, I served the within Notice of Motion and Motion for Remand for the Purpose of Moving for a New Trial on the Ground of Newly Discovered Evidence; Affidavit of Burton Marks and Points and Authorities in Support Thereof, on the Respondent in said action by placing a true copy thereof enclosed in a sealed envelope and postage fully prepaid, in the United States mail at Beverly Hills, California, addressed as follows:

United States Attorney
312 N. Spring Street
Los Angeles, California
Attn: Mike Balaban, Esq.

/s/ LINDA MORGAN
Linda Morgan

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 26TH DAY
OF SEPTEMBER, 1966.

/s/ HARVEY A. SCHNEIDER
Harvey A. Schneider
Notary Public in and for the
County of Los Angeles

My commission expires:

March 9, 1969

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 20,648

CHARLES KATZ,
Appellant,

v.

THE UNITED STATES OF AMERICA,
Appellee.

Order

Before: CHAMBERS and BARNES, Circuit Judges; and POWELL, District Judge.

In view of the motion to remand, filed by appellant, we request that each side file at or before the time set for hearing the argument, i.e., October 7, 1966, such affidavits, transcripts of testimony, or certified copies of necessary documents (if any there be), (1) to establish whether or not appellant was convicted with respect to the matter about which the testimony was subsequently compelled; and (2) of any further proceedings (if any there be) by any party in *Frank* v. *United States*, 347 F.2d 486, subsequent to July 30, 1965.

Dated: September 30, 1966
Los Angeles, California

RICHARD H. CHAMBERS
STANLEY N. BARNES
Circuit Judges
CHARLES L. POWELL
District Judge

[Stamp—Filed Sep. 30, 1966—Stanley N. Barnes per LR]

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 20648

CHARLES KATZ,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Order on Motion

Before: CHAMBERS and BARNES, Circuit Judges; and POWELL, District Judge.

Upon consideration thereof and good cause appearing therefor IT IS ORDERED that the motion of appellant for remand, coming on for hearing with the cause on merits, be, and the same hereby is denied.

RICHARD H. CHAMBERS
STANLEY N. BARNES
CHARLES L. POWELL
U. S. Judges

[Stamp—Filed Oct. 7, 1966—Wm. B. Luck, Clerk]

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 35

CHARLES KATZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (R. 222–231) is reported at 369 F. 2d 130.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1966. The petition for a writ of certiorari was filed on December 22, 1966, and was granted on March 13, 1967 (R. 232–233). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

This Court limited its grant of certiorari to questions 1 and 2 of the petition which read as follows (R. 232–233):

1. Whether evidence obtained by attaching an electronic listening and recording device to the top of a public telephone booth used and occupied by the Petitioner is obtained in violation of the Fourth Amendment to the United States Constitution.

A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.

2. Whether the search warrant used by the Federal officers in the instant case violated the Fourth Amendment to the United States Constitution in that said warrant was (a) not founded on probable cause; (b) an evidentiary search warrant and (c) a general search warrant.

The Court also directed both sides to "brief and present oral argument on the holding in *Frank* v. *United States*, 347 F. 2d 486, as it may affect this case" (R. 233).

STATEMENT

After a non-jury trial in the United States District Court for the Southern District of California, petitioner was convicted on all counts of an eight-count indictment charging him, as one engaged in the business of wagering, with making telephone calls on eight different occasions transmitting wagering infor-

mation between Los Angeles and Miami and Los Angeles and Boston (18 U.S.C. 1084). On June 21, 1965, petitioner was sentenced to pay a $300 fine (R. 213–214). The court of appeals affirmed (R. 222–231).

The evidence showed that on February 4, 1965, F.B.I. agents commenced visual surveillance of petitioner (R. 102). Over a period of about two weeks, they observed him make telephone calls from a particular row of telephone booths on Sunset Boulevard in Los Angeles (R. 112) during fixed hours and on an almost daily basis (R. 28). A check revealed that some of the calls were to a number in Massachusetts listed in the name of an individual known as a gambler.[1] Every day from February 19 through February 25, 1965, F.B.I. agents placed a recording device on top of the bank of phone booths from which petitioner made his calls (R. 103). Connected to the recorder were two microphones, which were taped to the outside of two of the booths.[2] None of the equipment (the recorder, the microphones and the fastenings) penetrated the booths (R. 103). Each day, as petitioner approached a certain spot about a block and a half away from the telephones, agents in a radio car surveilling petitioner signaled other agents near the booths, who then attached and activated the recorder and microphones. After petitioner departed,

[1] The F.B.I. investigation of the number which petitioner dialed is recounted in an affidavit filed by F.B.I. Agent Barron to support the issuance of the search warrant for petitioner's room (R. 12–14).

[2] The third booth was placed out of order with the consent of the telephone company (R. 112).

the device was removed (R. 106, 112).[3] Tape recordings of petitioner's end of the conversations were obtained on all days except February 22, when the recorder malfunctioned (R. 108), and these recordings were admitted into evidence at trial (R. 104–105, 107, 109, 116). All of the calls that were recorded involved the placing of bets and the receipt of wagering information (see R. 117–18, 163–174).

On February 25, petitioner was arrested by F.B.I. agents on the street after telephoning from one of the booths (R. 119). He was present later that day when F.B.I. agents conducted a search of his room pursuant to a warrant issued by a United States Commissioner (R. 11–12, 146). At that time and on the following morning when the agents came back to return two personal items which they had seized, petitioner (who had been warned of his rights (R. 120)) made statements to the effect that he had been in the wagering business for thirty years (R. 149, 151, 153–154). He also stated, in response to a remark by one of the agents, that "[i]f you had not bet interstate we wouldn't be involved in this matter": "Well, I cannot bet locally because the local bookmakers will not pay off" (R. 149).

SUMMARY OF ARGUMENT

I

After affirmance of his conviction on appeal (but prior to the filing of a petition for a writ of certiorari)

[3] Despite these precautions, on one occasion a person entered the vacant booth while petitioner was making a call. Although the unknown person's voice was perforce recorded, the recording was never played back (R. 113).

petitioner testified before a federal grand jury, pursuant to a grant of immunity, concerning the matters involved in this case. This does not render his conviction moot. The decision in *Frank* v. *United States,* 347 F. 2d 486 (C.A.D.C.), which held that the compelling of testimony pursuant to an immunity statute during the pendency of an appeal required reversal of the conviction, should be disapproved. Neither the language nor the purpose of the immunity statute at issue (47 U.S.C. 409(*l*)) requires that an immunity extend retrospectively to a conviction pending on appeal or certiorari. Affirmance of a conviction on appeal, or the denial of a petition for a writ of certiorari, cannot be deemed a "penalty" within the meaning of the immunity statute. The short of it is that the "penalty" was imposed by the original sentence prior to the grant of immunity. The legislative history of the immunity statute unmistakably shows that its purpose was to grant immunity, in accord with the scope of the constitutional privilege against self-incrimination, only as to *future* prosecutions.

II

The admission into evidence of recordings of petitioner's end of telephone conversations, obtained by F.B.I. agents placing a recorder and microphones on top and on the sides of the row of public telephone booths from which petitioner made calls, did not infringe the Fourth Amendment. No trespass or physical invasion of the booths was committed under *Goldman* v. *United States,* 316 U.S. 129, and *Silverman*

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v. *United States*, 365 U.S. 505, by the placing of the electronic device. Moreover, apart from any question of trespass, the row of public telephone booths from which petitioner made calls was not within the traditional concept of a "constitutionally protected area." Booths on a public street bear little resemblance to areas where the right of privacy has been held to inhere (*e.g.*, a home, office, hotel room or private car).

But even if the test of trespass, as exemplified by *Goldman*, is discarded, and even if this Court holds further that public booths of the kind involved in this case are entitled to some measure of protection under the Fourth Amendment, the question would remain: In the instant circumstances, was the search unreasonable?

In response, we stress these considerations. A row of public telephone booths, if "protected" at all, is not entitled to the same degree of protection as a home. As a result of extended investigation prior to the conduct of the surveillance at issue, the agents had strong "probable cause" to believe that petitioner was making his calls in order to obtain and transmit gambling information. The conversations which they monitored were themselves the essence of the federal crime under investigation. Finally, thorough precautions were taken to insulate the conversations of other members of the public from intrusion.

III

The search warrant for petitioner's premises was properly issued and executed. Assuming the validity of the agents' action in employing the recording device,

the affidavit for the warrant—which contained, *inter alia,* a summary of the evidence thus obtained—clearly established probable cause for believing that petitioner had engaged in illegal gambling and that his room harbored the instruments and records for carrying on such business. Moreover, the warrant described the items to be taken with sufficient particularity. The items authorized to be seized and admitted in evidence, consisting mainly of petitioner's gambling records and data used in conjunction with the placing of bets, were instrumentalities of the crime of interstate gambling.

ARGUMENT

I

PETITIONER'S TESTIMONY BEFORE A FEDERAL GRAND JURY UNDER A GRANT OF IMMUNITY, AFTER AFFIRMANCE OF HIS CONVICTION ON APPEAL BUT PRIOR TO THE FILING OF A PETITION FOR A WRIT OF CERTIORARI, DOES NOT REQUIRE VACATION OF THE CONVICTION

Before proceeding to a discussion of the search and seizure issues raised by the petition for a writ of certiorari, it is necessary to deal with a threshold jurisdictional question arising from the fact that after his conviction petitioner testified before a federal grand jury concerning the matters involved in this case pursuant to a grant of immunity. The question involves the correctness of the holding in *Frank* v. *United States,* 347 F. 2d 486 (C.A.D.C.), a matter specifically included in this Court's grant of certiorari in the present case.

On June 22, 1966, after his conviction in this case, petitioner was brought before a grand jury in the

United States District Court for the Southern District of Florida which was investigating unlawful interstate wagering. After having claimed the privilege against self-incrimination with respect to questions about telephone calls from Los Angeles to Miami in February 1965 (in part the subject matter of the present conviction), petitioner was informed by the government and the court that, if he did answer questions, he would gain immunity from prosecution pursuant to 47 U.S.C. 409(*l*). Petitioner nevertheless refused to answer and was adjudicated in civil contempt. However, on November 30, 1966, after the affirmance of the judgment in this case by the Ninth Circuit, but before the petition for a writ of certiorari was filed, petitioner did testify, under a grant of immunity, before another grand jury in the Southern District of Florida. His testimony covered, *inter alia*, the conversations which formed the basis of the present indictment.

The statute under which petitioner was granted immunity, Section 409 of the Communications Act, 66 Stat. 722, 47 U.S.C. 409(*l*), provides:

> No person shall be excused from attending and testifying or from producing books, papers, schedules or charges, contracts, agreements, and documents before the Commission, or in obedience to the subpena of the Commission, whether such subpena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this chapter, or of any amendments thereto, on the ground or for the reason that the testimony or

> evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

In *Frank* v. *United States,* 347 F. 2d 486 (C.A.D.C.), this statute was held to render moot a conviction pending on appeal where, after conviction, the defendant gave testimony concerning matters included in the charges pursuant to a grant of immunity. The court there was of the view that affirmance of the conviction would be a "penalty" within the meaning of the statute. While recognizing that, even so, it was not necessary to read the statute with literal exactitude, the court of appeals, without examining the legislative background of the statute, stated that it had no reason to decide that the Congressional intent or purpose was "other than to permit an exchange of a particular conviction * * * for the larger benefit believed to reside in compelling his self-accusatory testimony." 347 F. 2d at 491. This interpretation, in our view, is contrary to the language legislative history, and policy of the statute.

The immunity provision at issue here was enacted as part of the Communications Act of 1934, 48 Stat.

1064, 1097, 47 U.S.C. 409(i).[4] The legislative history of the Act contains no pertinent discussion of the immunity section, but indicates that its source was the so-called "Compulsory Testimony Act", part of the Interstate Commerce Act of 1893, 27 Stat. 443, 49 U.S.C. 46, from which it was taken practically verbatim. See Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 8301, 73d Cong., 2d Sess., p. 97; See also S. Rep. No. 781, 73d Cong., 2d Sess., p. 10; H. Rep. No. 1850, 73d Cong., 2d Sess., p. 8. That statute, sustained in *Brown* v. *Walker,* 161 U.S. 591 has, through the years, been the model for a host of similar statutes in other fields, many in almost identical language (of which the Act in question is one). See Note, *The Federal Witness Immunity Acts,* 72 Yale L.J. 1568, 1611–1612 (1963) (listing statutes). The Compulsory Testimony Act was passed in response to the decision of this Court in *Counselman* v. *Hitchcock,* 142 U.S. 547, which had held a predecessor enactment unconstitutional for failing to protect a witness from future prosecution based on leads obtained from the compelled testimony. In *Counselman* the Court had declared (142 U.S. at 585–586):

> We are clearly of opinion that no statute which leaves the party or witness subject to prosecution *after* he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of

[4] A 1952 amendment to section 409, 66 Stat. 721, 722, relettered the various subsections so as to make the immunity provision subsection (1) instead of (i). No substantive change was effected.

> the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against *future* prosecution for the offense to which the question relates. * * * [Emphasis added.]

Senator Cullom, who introduced the bill which became the Compulsory Testimony Act some sixteen days after the *Counselman* decision, stated that the bill was designed to "[follow] the line of the Supreme Court" in the *Counselman* case. 23 Cong. Rec. 6333. During the debate Congressman Wise stated (24 Cong. Rec. 503):

> The bill provides that where a witness is examined touching any violation of the act known as "the interstate commerce act", he shall not *thereafter be prosecuted* for any offense committed by him in connection with the subject about which he is examined. [Emphasis added.]

This legislative history demonstrates that the immunity provision here in question was not intended to benefit criminals by causing them to be given immunity for past crimes for which they have already been convicted and sentenced.

On the contrary, provisions of this type are designed to provide the essential substitute for the privilege against self-incrimination. *Brown* v. *United States,* 359 U.S. 41, 44–46; *Heike* v. *United States,* 227 U.S. 131, 142; *Brown* v. *Walker,* 161 U.S. 591. Evidence which was in existence before a witness is even called upon to testify, and which has already been found

sufficient to convict, has obviously been obtained without any encroachment on the Fifth Amendment. Thus, where a defendant is given immunity after he has been convicted there is no reason, under the Fifth Amendment, why the immunity should relate back to the conviction. See *Reina* v. *United States,* 364 U.S. 507, 513–514; *In re Bando,* 20 F.R.D. 610, 615 (S.D.N.Y.), reversed on other grounds *sub nom. United States* v. *Miranti,* 253 F. 2d 135 (C.A. 2); *United States* v. *Romero,* 249 F. 2d 371, 375 (C.A. 2); *United States* v. *Gernie,* 252 F. 2d 664 (C.A. 2), certiorari denied, 356 U.S. 968.

Nor do we believe that affirmance of the conviction can be deemed a "penalty" within the literal terms of the statute. The penalty was fixed by the district court at the time of conviction; *i.e.,* before any immunity had been granted. If a case is pending on appeal when a defendant testifies under a grant of immunity, the court of appeals may decide whether the penalty stands or falls, but it does not itself impose a penalty. Where as here the conviction has already been affirmed by the court of appeals before the immunity attaches, the penalty is even farther removed from the immunity. This Court held, in *Reina* v. *United States,* 364 U.S. 507, 513 that a prisoner serving a sentence was not justified in refusing to testify under the federal narcotics immunity statute, 18 U.S.C. 1406, "unless he first received a 'general pardon or amnesty' covering the unserved portion of his sentence." In rejecting the contention, this Court stated (364 U.S. at 514):

> Some language in *Brown* v. *Walker,* 161 U.S., at 601, to which petitioner refers, compares immunity statutes to the traditional declarations of amnesty or pardon. But neither in that opinion nor elsewhere is it suggested that immunity statutes, to escape invalidity under the Fifth Amendment, need do more than protect a witness from future prosecutions. * * *

In our view the situation here is no different from the situation in *Reina.* See also, *Piemonte* v. *United States,* 367 U.S. 556.

II

THE OVERHEARING OF PETITIONER'S TELEPHONE CONVERSATIONS DID NOT, IN THE CIRCUMSTANCES OF THIS CASE, VIOLATE THE FOURTH AMENDMENT

A. In *Goldman* v. *United States,* 316 U.S. 129, 134–135, this Court sustained the admissibility of evidence obtained by a detectaphone placed by federal agents, stationed in an adjoining office, against the dividing wall of the defendant's office. The Court relied on the fact that, while a prior trespass had been made into the defendant's premises for the purpose of installing another listening device which did not work, no trespass had occurred in the use of the detectaphone. The *Goldman* decision (with a modification not here pertinent) has been deemed to stand for the proposition that a trespass, either of an eavesdropper or an eavesdropping device, is necessary to constitute a violation of the Fourth Amendment.[5] *E.g., United States*

[5] *Silverman* v. *United States,* 365 U.S. 505, modified the trespass test slightly to prohibit surveillance accompanied by "physical invasion" of the surveilled premises (*id.,* at 510), even if not a technical trespass. However, we are not here concerned with that distinction.

v. *Pardo-Bolland,* 348 F. 2d 316 (C.A. 2), certiorari denied, 382 U.S. 944; *Anspach* v. *United States,* 305 F. 2d 48 (C.A. 10), certiorari denied, 371 U.S. 826; *Jones* v. *United States,* 339 F. 2d 419 (C.A. 5), certiorari denied, 381 U.S. 915. It is apparent, as petitioner recognizes, that if *Goldman* is approved, that case is controlling authority that the surveillance here was lawful, since no trespass into the area surveilled was committed by the placing of the electronic device on the outside of the row of public telephone booths which petitioner frequented. Petitioner, moreover, had no proprietary interest in those premises.

We recognize, however, that the *Goldman* decision has been criticized as not providing an adequate means of dealing with the problems arising from the use of electronic equipment such as the "parabolic microphone which can pick up a conversation three hundred yards away," *Silverman* v. *United States,* 365 U.S. 505, 508; *Lopez* v. *United States,* 373 U.S. 427, 468 n. 16 (Brennan, J., dissenting), and that the Court may therefore wish to reconsider the validity of the *Goldman* decision. But assuming that *Goldman* should be modified where electronic surveillance is used to overhear conversations taking place within a "constitutionally protected area" see, *e.g., Silverman* v. *United States,* 305 U.S. 505, 510,[6] we question whether a pub-

[6] We note, however, that not all observations of matters occurring in a "constitutionally protected area" are prohibited by the Fourth Amendment. In *United States* v. *Lee,* 274 U.S. 559, Mr. Justice Brandeis, writing for a unanimous Court, found no illegal search where cases of liquor were observed in plain view on the open deck of a boat, even though a searchlight had been used to illuminate the deck. Similarly, in

lic telephone booth on a public street is a "constitutionally protected area."

To date, the Court has held that the following are constitutionally protected areas: a house, *Weeks* v. *United States,* 232 U.S. 383; an office, *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385; a store, *Amos* v. *United States,* 255 U.S. 313; a hotel room, *United States* v. *Jeffers,* 342 U.S. 48; a private automobile, *Henry* v. *United States,* 361 U.S. 98; and a warehouse, *See* v. *City of Seattle,* No. 180, O.T. 1966, decided June 5, 1967. On the other hand, the Court has suggested that a visiting room in a jail is not a protected area, *Lanza* v. *New York,* 370 U.S. 139, 141–144, and it has held that an open field is not a protected area. *Hester* v. *United States,* 265 U.S. 57, 59.

The rights of privacy reflected in the guarantees of the Fourth Amendment must be measured in terms of the reasonable expectations of a person in a given location that he is free from scrutiny. Thus a field and a public street are normally not places where a man may legitimately anticipate that he will not be observed. *Hester* v. *United States,* 265 U.S. 57, 59; see *Lopez* v. *United States,* 373 U.S. 427, 466 n. 12 (Brennan, J., dissenting).

A row of public telephone booths, we submit, is not significantly different. Although the occupant is alone

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McDonald v. *United States,* 335 U.S. 451, the Court apparently found no illegal search in the observations made by police officers who peeked through an open transom. *Id.* at 455 and 458. Thus, petitioner did not, and could not, object to the testimony of Agent Frei concerning what he overheard by the "naked ear" while lawfully in the hotel room immediately next door to petitioner's room (R. 133–134).

in a booth, he is normally visible to persons outside it since portions of such booths are constructed of glass or other transparent material. In addition the booth, even when the door is closed, is not designed to be soundproof but merely to shut out sufficient sound to enable the parties to hear each other with comparative ease. A person speaking with normal voice may readily be overheard by a person in an adjacent booth. Petitioner, by choosing to place calls transmitting wagering information from the row of public telephone booths on a main avenue (Sunset Boulevard) in Los Angeles rather than from his own premises, voluntarily ran the risk that his words might be overheard by someone in the adjoining booth.[7] There is little basis for suggesting that the degree of privacy which petitioner could reasonably expect to enjoy in the booths was comparable to that which he could expect (and demand) in his home. See *Smayda* v. *United States,* 352 F. 2d 251, 254–256 (C.A. 9), certiorari denied, 382 U.S. 981. Indeed, there is no evidence that petitioner ceased speaking on the occasion when another person entered the adjacent booth to make a call. Under these circumstances he cannot claim that he is constitutionally protected from overhearing, regardless of the means by which it was accomplished.

The latest district court to consider the question has held that a single public telephone booth is not a protected area. *United States* v. *Borgese,* 235 F. Supp. 286, 294 (S.D.N.Y.). But see *United States* v. *Stone,*

[7] He apparently hoped to reduce the chances of the calls being traced back to him, since there would be no record that he was the caller.

232 F. Supp. 396 (N.D. Tex.) and *United States* v. *Madison,* 32 L.W. 2243 (D.C. Ct. Gen. Sess.). A row of booths, because of the greater possibility of being overheard, is obviously a less "private" location than a single, isolated booth. Cf. Greenberg, *Electronic Surveillance of Public Telephone Booths,* 41 Los Angeles Bar Bull. 490, 522 (1966).

B. But even if the row of telephone booths from which petitioner placed his calls is deemed to be entitled to some degree of protection under the Fourth Amendment and this Court determines to overrule *Goldman,* we submit that in the particular circumstances of this case the search was not "unreasonable."

Those who have criticized *Goldman* for leaving electronic surveillance outside "the pale of the Fourth Amendment" have not suggested that the application of the principles of that Amendment to electronic surveillance would, or should, result in the exclusion of all evidence obtained by such means. See *Lopez* v. *United States,* 373 U.S. 427, 464, n. 11, and accompanying text (Brennan, J., dissenting); *Goldman* v. *United States,* 316 U.S. 129, 140, n. 6 (Murphy, J., dissenting). "The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable." *Carroll* v. *United States,* 267 U.S. 132, 147. The determination of reasonableness depends ultimately "upon the facts and circumstances of each case." *Cooper* v. *California,* 386 U.S. 58, 59; see *United States* v. *Rabinowitz,* 339 U.S. 56, 64; *Rios* v. *United States,* 364 U.S. 253.

Even if a public telephone booth is deemed to be a constitutionally protected area, we submit that the

standards to be applied in determining the reasonableness of the search here involved should not be as strict as those that would apply to the search of a private house. The concept that the standards of reasonableness may vary depending upon the type of constitutionally protected area involved is not novel. In *Carroll* v. *United States,* 267 U.S. 132, this Court recognized that different standards are to be applied in determining the reasonableness of the search of an automobile than are used in determining the reasonableness of the search of a house. See *Preston* v. *United States,* 376 U.S. 364, 366; compare *Silverman* v. *United States,* 365 U.S. 505. In *See* v. *City of Seattle,* No. 180, O.T. 1966, decided June 5, 1967, this Court indicated that the search of a business premises involves a different standard of reasonableness than the search of a private home. See also *Davis* v. *United States,* 328 U.S. 582. In addition, the Court has indicated that when the premises involved are being used to carry on an unlawful business, the extent of its protection under the Fourth Amendment may be somewhat diminished. See *Lewis* v. *United States,* 385 U.S. 206, 211.

We of course agree that normally the strictest protections should apply to a man's home, which has often been likened to a castle for the purposes of the Fourth Amendment. *E.g., Weeks* v. *United States,* 232 U.S. 383, 389–391; *Silverman* v. *United States,* 365 U.S. 505, 511–512. However, the interest of any individual in a public telephone booth, if protected at all, is so transitory and so limited that it need not be accorded all of the sanctity of a home. As noted

above, the occupant of a public telephone booth normally runs the risk that he may be overheard by people in adjoining booths and is almost always amenable to visual surveillance. Thus, while we assume that the facts and circumstances of this case would not have justified the warrantless search of petitioner's home, we submit that they were sufficient to justify the electronic surveillance of petitioner in a public phone booth which he used for the exclusive purpose of carrying on his illegal gambling operation, even though the agents did not have a warrant.[8]

In determining the reasonableness of the search which took place in this case, we believe it appro-

[8] Although apparently recognizing that the standards of reasonableness may vary depending upon the nature of the premises (Pet. Br. 13), petitioner does not consider the significance of the absence of a warrant. As set forth above, we believe that the occupant's interest in a public telephone booth is so limited that a warrant should not be deemed to be a prerequisite to a valid search where the agents have probable cause to believe that a crime is being committed by the occupant of the booth. Moreover, in view of the fact that the agents here had reason to believe that their actions were valid under the existing law as set forth in *Goldman*, the government should not be penalized because the agents did not endeavor to obtain a warrant which they reasonably believed to be unnecessary.

Similarly, since the use of listening devices such as that approved in *Goldman* is involved in other cases presently pending on appeal, see *e.g.*, *United States* v. *Desist*, Docket No. 30849 (C.A. 2) argued January 19, 1967 (in which conversations among conspirators relating to the illegal importation of over two hundred pounds of heroin were overheard by use of a detectaphone in an adjoining hotel room), the government would argue that if *Goldman* is to be overruled, the decision should not be retroactive. *Stovall* v. *Denno*, 388 U.S. 293; *Linkletter* v. *Walker*, 381 U.S. 618; *Tehan* v. *Shott*, 382 U.S. 406; *Johnson* v. *New Jersey*, 384 U.S. 719.

priate for the Court to consider the strength of the probable cause which the agents had to believe that petitioner was using the phone booth to carry on his illegal activity and the precautions taken to limit the scope of the surveillance. Cf. *United States* v. *Ventresca,* 380 U.S. 102, 106; *Jones* v. *United States,* 362 U.S. 257, 270. Here the agents did not utilize the recorder and microphones with respect to petitioner until after confidential information and personal observation of his activities over a period of two weeks had established a strong probability that he was using the telephone in question to place interstate calls transmitting gambling information (R. 12–14, 102, 112). The fixed times and almost daily nature of the calls (R. 28) indicated that petitioner was not using the telephone to make calls unrelated to his gambling business, as proved to be the case. The agents also took steps to ensure that no member of the public, apart from petitioner, using the telephones would have his conversation transcribed. The recorder was attached and activated a short time before petitioner entered the booths and was removed immediately after he departed. On the occasion when a member of the public occupied one of the booths while petitioner was in the other making a call, the unknown person's conversation, although recorded, was never played back (R. 113).

Finally, it should be noted that the surveillance involved here was not undertaken to discover "mere evidence" in the form of admissions of past criminal activities. Rather, all of the conversations which were overheard involved the receipt of wagering informa-

tion and the placing of bets in violation of 18 U.S.C. 1084. Thus, the conversations which were overheard were the very means and instrumentalities by which petitioner's crimes were committed.

In summary, we conclude that even if the telephone booth is deemed to be a protected area and this Court is disposed to abandon the trespass test of *Goldman* and hold that all electronic surveillance of conversations taking place within a constitutionally protected area must meet the standards of the Fourth Amendment, those standards were met in this case. The search at issue was based on ample probable cause, was carefully circumscribed, and involved only a public phone booth in which a crime was then and there being committed. The approval by this Court of the careful law enforcement efforts found in this case will not jeopardize the privacy of "the citizen who has given no good cause for believing he is engaged in [illegal] activity" *Brinegar* v. *United States,* 338 U.S. 160, 177.[9]

III

THERE WAS NO DEFECT IN THE WARRANT AUTHORIZING A SEARCH OF PETITIONER'S PREMISES

On February 25, 1965, the date of petitioner's arrest, F.B.I. agents obtained a warrant authorizing them to search petitioner's premises for "bookmaking records, wagering paraphernalia, including but not limited to,

[9] The Department of Justice has taken steps to insure that the use of electronic eavesdropping by federal law enforcement officials will be carefully controlled. On June 16, 1967, the Attorney General sent a memorandum to the heads of all executive departments and agencies setting forth rules governing the use of such equipment.

bet slips, betting markers, run down sheets, schedule sheets indicating the lines, adding machines, money, telephones, [and] telephone address listings . . . designed and intended for use as the means of committing criminal offenses in violation of [18 U.S.C. 1084]" (R. 11). The warrant was issued by a United States Commissioner on the basis of an affidavit from one John Robert Barron, an F.B.I. agent involved in the investigation of petitioner. The affidavit, which appears at R. 12–14, set forth that Barron had received information in October 1964 from "confidential informants (who in the past have furnished reliable information) that a New York bookmaker was in the Los Angeles area operating a sports book" (R. 12); that surveillance of this bookmaker's activities had established that petitioner was one of his associates; and that investigation had disclosed that petitioner (whose address had been ascertained) had, during the period from February 4 to February 25, 1965, been in contact with known gamblers. The affidavit also recited that a reliable confidential informant had informed the affiant that petitioner made long distance telephone calls from pay phones in the morning and evening hours; that the affiant and another agent had personally witnessed petitioner make telephone calls on February 10 and 11 to a number in Boston, which investigation established to be the number in an apartment used by two well known gambling figures (who were named); and that recordings of petitioner's end of telephone conversations, obtained on all days but one between February 19 and February 24, 1965, revealed that petitioner, on each of these occasions,

called a number out of state and "received the basketball line and made wagers" (R. 13). The affidavit further set forth that F.B.I. agent Frei, on February 23, 1965, had occupied the room adjacent to petitioner and had overheard him "engage in approximately 15 telephone conversations with unknown persons, indicating he was making sports bets" (R. 14).

The search was conducted between the hours of 11:00 a.m. and 1:35 p.m. on February 25 (R. 146). Petitioner, who had been arrested, was present in the room during part of this time (R. 148). The items seized were taken from three separate sources—a "dark blue plastic brief case", a "blue National Airlines bag on [the] floor of [the] east closet" and the contents "from [a] desk drawer" (R. 14–15).[10] Principal among the items seized were approximately 150 pages recording past collegiate basketball games, which petitioner used to make predictions on the outcome of future games and to place bets accordingly (see R. 149, 153–154). These records were introduced in evidence at petitioner's trial (R. 147; see R. 149, 151).

At a pre-trial hearing on a motion to suppress evidence (R. 27–80), the judge ordered some of the items which were taken returned to petitioner on the grounds that they were immaterial to the charge against him or were "mere evidence" (R. 74–77).[11]

[10] A list of the items seized appears at pages 14–16 of the Record.

[11] Although the record is somewhat sketchy, it appears that the court found all the itms listed on the return at R. 14 to have been properly seized (R. 74). The government indicated that it would return a newspaper clipping and a registration

The agents, on the day following the search, also brought back two items, a nail file and key chain (R. 154), which they had mistakenly seized.

If the recordings of petitioner's phone calls are deemed invalid, there would be no retrial of petitioner in light of his subsequent testimony under a grant of immunity. We therefore discuss the issues raised by the petition as to the legality of the search warrant on the assumption that the electronic surveillance was permissible.

A. THE WARRANT WAS FOUNDED ON PROBABLE CAUSE

On that assumption, *i.e.*, that the recordings did not violate petitioner's rights under the Fourth Amendment, there clearly was probable cause for the issuance of the search warrant. The facts properly before the United States Commissioner were more than adequate to establish probable cause to believe that petitioner had committed offenses under 18 U.S.C. 1084 and that records and paraphernalia pertaining to his gambling activities would be found in

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card issued to petitioner by the Las Vegas Police Department (R. 74–75) (items 1 and 2 from National Airlines bag at R. 15) and that it had "no objection" to returning two rolls of quarters (R. 76) (item 2 from desk drawer at R. 15). Two telephone slips or records of telephone calls (items 5 and 6 from desk drawer at R. 15) were ordered returned because they were not the best evidence (R. 76); a piece of hotel stationery with notations was ordered returned as "mere evidence" (R. 76) (item 10 from desk drawer at R. 16); and the government stated that a National Airlines ticket which had been seized had already been returned (R. 77) (item 12 from desk drawer at R. 16). All other items were held to have been properly taken (R. 77).

his room. See *United States* v. *Ventresca,* 380 U.S. 102; *Jaben* v. *United States,* 381 U.S. 214.

B. THE WARRANT SUFFICIENTLY SPECIFIED THE ITEMS TO BE SEIZED AND WAS NOT A "GENERAL" WARRANT

The warrant described the objects of the search as follows (R. 11):

> * * * bookmaking records, wagering paraphernalia, including but not limited to, bet slips, betting markers, run down sheets, schedule sheets indicating the lines, adding machines, money, telephones, [and] telephone address listings.

The claim that this description was not sufficiently specific runs afoul of this Court's recent admonition against "hypertechnical" interpretation of warrants. See *United States* v. *Ventresca,* 380 U.S. 102, 109. The warrant plainly did not authorize a general exploration of all of petitioner's effects. It restricted the quest to items related directly to petitioner's activities as an interstate gambler. The fact that the warrant, in the main, listed described categories of things to be seized, rather than individual objects, did not render it invalid. Categorization was inevitable in view of the fact that petitioner's particular method of keeping records could not be determined in advance. Similarly phrased warrants have been uniformly sustained. *E.g., United States* v. *Clancy,* 276 F. 2d 617 (C.A. 7), reversed on other grounds, 365 U.S. 312;[12] *Nuchols* v. *United States,* 99 F. 2d 353, 355 (C.A. D.C.), certiorari denied *sub nom. Floratos*

[12] The warrant there, from which the court of appeals quoted (R. 229 n. 5, 369 F. 2d at 134 n. 5), was in all relevant respects indistinguishable from that in the present case.

v. *United States,* 305 U.S. 626; see also *Steele* v. *United States No. 1,* 267 U.S. 498, 504.[13]

C. THE WARRANT DID NOT AUTHORIZE A SEARCH FOR "MERE EVIDENCE"

The warrant specifically limited the items seizable to those "which are designed and intended for use as the means of committing criminal offenses in violation of Title 18, United States Code Section 1084" (R. 11). The principal items taken and introduced into evidence—petitioner's records of prior basketball contests—were clearly instrumentalities of the crime, as was shown by his own admission that he could not continue gambling without them (R. 149). Other papers taken and also introduced, consisting of "owe sheets" showing amounts won, lost and owing on prior and outstanding bets (see R. 176, 186), were business records and as such also instrumentalities of the crime. *Marron* v. *United States,* 275 U.S. 192; *Leahy* v. *United States,* 272 F. 2d 487 (C.A. 9). The fact that the agents also seized several items that were either "mere evidence" [14] or unrelated to the crime does not

[13] Greater specificity might be required where the items to be seized are such as to come within the protection of the First Amendment. Compare *Stanford* v. *Texas,* 379 U.S. 476, 485–486. As the Court noted in *Marcus* v. *Search Warrant,* 367 U.S. 717, 731 "The authority * * * under the warrants issued in this case, broadly to seize 'obscene * * * publications,' poses problems not raised by the warrants to seize 'gambling implements.'"

[14] The prohibition against seizing "mere evidence" is not a requirement of the Fourth Amendment (*Warden* v. *Hayden,* 387 U.S. 294), although searches under Rule 41, Federal Rules of Criminal Procedure, are limited to fruits and instrumentalities of a crime. Hence even if some "mere evidence" was seized, there would be no reason under the Constitution to exclude, for that reason, other items properly seized under the warrant.

render inadmissible the lawfully seized items. There is no suggestion that the agents ransacked the premises or conducted a search that went beyond their legitimate aim of uncovering the means and instrumentalities used by petitioner to conduct his gambling business. See, generally, *Kremen* v. *United States*, 353 U.S. 346.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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IN THE SUPREME COURT OF THE UNITED STATES

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CHARLES KATZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER

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Introductory Statement

The purpose of this Brief is to reply to certain contentions and arguments made by the Respondent herein. The Statement of Jurisdiction, Questions Presented, Constitutional Provisions Involved, Statement of the Case, Statement of the Facts, and Argument, respectively, set forth in the opening Brief for Petitioner are incorporated herein and made a part hereof by reference.

Argument in Reply

On page 14 of its Brief, in referring to Petitioner's position herein, Respondent states:

> ". . . It is apparent, as petitioner recognizes, that if *Goldman* is approved, that case is controlling au-

> thority that the surveillance here was lawful, since no trespass into the area surveilled was committed by the placing of the electronic device on the outside of the row of public telephone booths which petitioner frequented. Petitioner, moreover, had no proprietary interest in those premises."

It is obvious that in making this statement Respondent has misinterpreted the argument advanced by Petitioner and the law applicable to the facts of this case.

Petitioner does *not* contend that if *Goldman* v. *United States,* 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322, is approved, that the search of the telephone booth was lawful. Quite the contrary, it is absolutely clear that there was *no* legal justification for the search.

In *Ker* v. *California,* 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726, this Court held that a search is lawful only if (1) it is conducted pursuant to a valid search warrant or (2) if no warrant was obtained, it was incident to a lawful arrest. Since the Federal Agents in this case had no search warrant when they intercepted Petitioner's telephone calls and since no arrest was made of Petitioner until after all of the monitoring had been completed,[1] the search was patently unconstitutional.[2]

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[1] While California law seems to permit a search incident to lawful arrest, even though the search preceded the arrest (see e.g., *People* v. *Torres,* 56 C.2d 864, 17 Cal. Rptr. 495; *People* v. *Simon,* 45 C.2d 645, 290 P.2d 531), the federal rule which applies in this case, requires the search to follow the arrest. (See e.g., *Mosco* v. *United States,* 9th Cir. 1962, 301 F.2d 180.) In fact, this Court's pronouncements in *Ker* v. *California, supra,* and *Stoner* v. *California,* 376 U.S. 483, 84 S. Ct. 889, 11 L. Ed.2d 856, may have invalidated the California rule.

[2] It is also important to note that the conduct of the Federal Agents in this case was in violation of California statutory law,

Respondent's statement that Petitioner "had no proprietary interest in those premises [the phone booth]" is repudiated by the fact that Petitioner spent a considerable sum in the form of toll money while using the booth. Certainly this entitled him to some "proprietary interest", to the extent it is necessary to speak in terms of "proprietary interest" at all.

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i.e., Penal Code §653j (set forth below). It is respectfully submitted that evidence obtained in violation of this statute could not be used in a federal prosecution. *Elkins* v. *United States*, 364 U.S. 206, 80 S. Ct. 1437, 4 L. Ed.2d 1669 (in which the "silver platter" doctrine was repudiated). Penal Code §653j provides:

"(a) Every person or his authorized agent not a party to the communication who, intentionally and without the consent of any party to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records a confidential communication, whether such communication is carried on among such parties in the presence of one another or by means of a telegraph, telephone or other device, except a radio, shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars ($1,000), or by both such fine and imprisonment.

(b) The term 'person' includes an individual, business association, partnership, corporation, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, but excludes an individual known by all parties to a confidential communication to be overhearing or recording such communication or an individual acting under the direction of a party to the confidential communication.

(c) The term 'confidential communication' includes any communication carried on in such circumstances as may reasonably indicate that the parties to such communication desire it to be confined to such parties, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

(d) Except as proof in a suit or prosecution for violation of this section, no evidence obtained as a result of eavesdrop-

Respondent cites *Hester* v. *United States,* 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898, for the proposition that an open field is not a constitutionally protected area. It is true that this statement was made by the Court in *Hester.* It is respectfully submitted, however, that the statement was neither necessary for the decision in that case, nor does it comport with the view that the fundamental purpose of the Fourth Amendment is to protect the individual's right to privacy. It is Petitioner's position that the true test of the Fourth Amendment's protection is whether "the average reasonable man [would] believe that the person whose conversation had been intercepted intended and desired his conversation to be private." (Brief for Petitioner, p. 13.) Under this test, if two persons believed that an uninhabited open field was the safest and most

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ping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative or other proceeding.

(e) This section shall not apply to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the overhearing is for the purpose of construction, maintenance, conduct or operation of the services and facilities of such public utility, or to the normal use of the services and facilities furnished by such public utility pursuant to its tariffs.

(f) This section shall not be construed to repeal Sections 591, 593(b), 619, 621, 640, 653h or 653i of this code or to render lawful any act which is unlawful under any of those sections.

(g) This section does not apply to the use of hearing aids and similar devices, by persons afflicted with impaired hearing, for the purpose of overcoming the impairment to permit the hearing of sounds ordinarily audible to the human ear.

(h) Nothing in this section shall be construed as prohibiting law enforcement officers from doing that which they are otherwise authorized by law to do. (Added Stats 1963, c. 1886, p. 3871, § 1.)"

private place to conduct a conversation, that conversation should be afforded constitutional protection.[3]

It should also be noted that Respondent's statement that "The right of privacy reflected in the guarantees of the Fourth Amendment must be measured in terms of the reasonable expectations of a person in a given location that he is free from scrutiny" (Brief for the Respondent, p. 15) misinterprets the purport of the Fourth Amendment. It is not the right to be free from visual scrutiny which the Fourth Amendment protects, but rather the right to have one's private oral communications free from interception.

Conclusion

Based on the arguments contained in this Brief and the Opening Brief for Petitioner, Petitioner respectfully prays that the judgment be reversed.

Respectfully submitted,

BURTON MARKS
HARVEY A. SCHNEIDER
Attorneys for Petitioner

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[3] It is also most significant to note that the definition of "confidential communication" as contained in the California eavesdropping statute (Penal Code §653j(c), Footnote 2) is very similar to the test for privacy proposed by Petitioner herein.

SUPREME COURT OF THE UNITED STATES

No. 35.—October Term, 1967.

Charles Katz, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[December 18, 1967.]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioner was convicted in the District Court for the Southern District of California under an eight-count indictment charging him with transmitting wagering information by telephone from Los Angeles to Miami and Boston, in violation of a federal statute.[1] At trial the Government was permitted, over the petitioner's objection, to introduce evidence of the petitioner's end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls. In affirming his conviction, the

[1] 18 U. S. C. § 1084. That statute provides in pertinent part:

"(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

"(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal."

Court of Appeals rejected the contention that the recordings had been obtained in violation of the Fourth Amendment, because "[t]here was no physical entrance into the area occupied by [the petitioner]."[2] We granted certiorari in order to consider the constitutional questions thus presented.[3]

The petitioner has phrased those questions as follows:

"A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device

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[2] 369 F. 2d 130, 134.

[3] 386 U. S. 954. The petition for certiorari also challenged the validity of a warrant authorizing the search of the petitioner's premises. In light of our disposition of this case, we do not reach that issue.

[4] We find no merit in the petitioner's further suggestion that his indictment must be dismissed. After his conviction was affirmed by the Court of Appeals, he testified before a federal grand jury concerning the charges involved here. Because he was compelled to testify pursuant to a grant of immunity, 47 U. S. C. § 409 (*l*), it is clear that the fruit of his testimony cannot be used against him in any future trial. But the petitioner asks for more. He contends that his conviction must be vacated and the charges against him dismissed lest he be "subjected to [a] penalty . . . on account of [a] . . . matter . . . concerning which he [was] compelled . . . to testify . . . ." 47 U. S. C. § 409 (*l*). *Frank* v. *United States*, 347 F. 2d 486. We disagree. In relevant part, § 409 (*l*) substantially repeats the language of the Compulsory Testimony Act of 1893, 27 Stat. 443, 444, 49 U. S. C. § 46, which was Congress' response to this Court's statement that an immunity statute can supplant the Fifth Amendment privilege against self-incrimination only if it affords adequate protection from future prosecution or conviction. *Counselman* v. *Hitchcock*, 142 U. S. 547, 585–586. The statutory provision here involved was designed to provide such protection, see *Brown* v. *United States*, 359 U. S. 41, 45–46, not to confer immunity from punishment pursuant to a *prior* prosecution and adjudication of guilt. Cf. *Reina* v. *United States*, 364 U. S. 507, 513–514.

to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

"B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution."

We decline to adopt this formulation of the issues. In the first place, the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase "constitutionally protected area." Secondly, the Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all.[4] Other provisions of the Constitution protect personal privacy from other forms of governmental invasion.[5] But the protection of a person's *general* right to privacy—

[4] "The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. . . . And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home." *Griswold* v. *Connecticut*, 381 U. S. 479, 509 (dissenting opinion of MR. JUSTICE BLACK).

[5] The First Amendment, for example, imposes limitations upon governmental abridgment of "freedom to associate and privacy in one's associations." *NAACP* v. *Alabama*, 357 U. S. 449, 462. The Third Amendment's prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion. To some extent, the Fifth Amendment too "reflects the Constitution's concern for . . . '. . . the right of each individual "to a private enclave where he may lead a private life." '". *Tehan* v. *Shott*, 382 U. S. 406, 416. Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution.

his right to be let alone by other people[6]—is, like the protection of his property and of his very life, left largely to the law of the individual States.[7]

Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a "constitutionally protected area." The Government has maintained with equal vigor that it was not.[8] But this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case.[9] For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See *Lewis* v. *United States*, 385 U. S. 206, 210; *United States* v. *Lee*, 274 U. S. 559, 563. But

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[6] See Warren and Brandeis, "The Right to Privacy," 4 Harv. L. Rev. 193 (1890).

[7] See, *e. g.*, *Time, Inc.* v. *Hill*, 385 U. S. 374. Cf. *Breard* v. *Alexandria*, 341 U. S. 622; *Kovacs* v. *Cooper*, 336 U. S. 77.

[8] In support of their respective claims, the parties have compiled competing lists of "protected areas" for our consideration. It appears to be common ground that a private home is such an area, *Weeks* v. *United States*, 232 U. S. 383, but that an open field is not. *Hester* v. *United States*, 265 U. S. 57. Defending the inclusion of a telephone booth in his list the petitioner cites *United States* v. *Stone*, 232 F. Supp. 396, and *United States* v. *Madison*, 32 L. W. 2243 (D. C. Ct. Gen. Sess.). Urging that the telephone booth should be excluded, the Government finds support in *United States* v. *Borgese*, 235 F. Supp. 286.

[9] It is true that this Court has occasionally described its conclusions in terms of "constitutionally protected areas," see, *e. g.*, *Silverman* v. *United States*, 365 U. S. 505, 510, 512; *Lopez* v. *United States*, 373 U. S. 427, 438–439; *Berger* v. *New York*, 388 U. S. 41, 57, 59, but we have never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem.

what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. See *Rios* v. *United States*, 364 U. S. 253; *Ex parte Jackson*, 96 U. S. 727, 733.

The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office,[10] in a friend's apartment,[11] or in a taxicab,[12] a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call, is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

The Government contends, however, that the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry, *Olmstead* v. *United States*, 277 U. S. 438, 457, 464, 466; *Goldman* v. *United States*, 316 U. S. 129, 134–136, for that Amendment was thought to limit only searches and seizures of tangible

[10] *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385.
[11] *Jones* v. *United States*, 362 U. S. 257.
[12] *Rios* v. *United States*, 364 U. S. 253.

property.[13] But "[t]he premise that property interests control the right of the Government to search and seize has been discredited." *Warden* v. *Hayden*, 387 U. S. 294, 304. Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any materal object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any "technical trespass under . . . local property law." *Silverman* v. *United States*, 365 U. S. 505, 511. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

The question remaining for decision, then, is whether the search and seizure conducted in this case complied

[13] See *Olmstead* v. *United States*, 277 U. S. 438, 464–466. We do not deal in this case with the law of detention or arrest under the Fourth Amendment.

with constitutional standards. In that regard, the Government's position is that its agents acted in an entirely defensible manner: They did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth,[14] and they took great care to overhear only the conversations of the petitioner himself.[15]

Accepting this account of the Government's actions as accurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place. Only last Term we sustained the validity of such an authorization, holding that, under sufficiently "precise and discriminate circumstances," a federal court

[14] Based upon their previous visual observations of the petitioner, the agents correctly predicted that he would use the telephone booth for several minutes at approximately the same time each morning. The petitioner was subjected to electronic surveillance only during this predetermined period. Six recordings, averaging some three minutes each, were obtained and admitted in evidence. They preserved the petitioner's end of conversations concerning the placing of bets and the receipt of wagering information.

[15] On the single occasion when the statements of another person were inadvertently intercepted, the agents refrained from listening to them.

may empower government agents to employ a concealed electronic device "for the narrow and particularized purpose of ascertaining the truth of the . . . allegations" of a "detailed factual affidavit alleging the commission of a specific criminal offense." *Osborn* v. *United States*, 385 U. S. 323, 329–330. Discussing that holding, the Court in *Berger* v. *New York*, 388 U. S. 41, said that "the order authorizing the use of the electronic device" in *Osborn* "afforded similar protections to those . . . of conventional warrants authorizing the seizure of tangible evidence." Through those protections, "no greater invasion of privacy was permitted than was necessary under the circumstances." *Id.*, at 57.[16] Here, too, a similar

[16] Although the protections afforded the petitioner in *Osborn* were "*similar* . . . to those . . . of conventional warrants," they were not identical. A conventional warrant ordinarily serves to notify the suspect of an intended search. But if Osborn had been told in advance that federal officers intended to record his conversations, the point of making such recordings would obviously have been lost; the evidence in question could not have been obtained. In omitting any requirement of advance notice, the federal court that authorized electronic surveillance in *Osborn* simply recognized, as has this Court, that officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence. See *Ker* v. *California*, 374 U. S. 23, 37–41.

Although some have thought that this "exception to the notice requirement where exigent circumstances are present," *id.*, at 39, should be deemed inapplicable where police enter a home before its occupants are aware that officers are present, *id.*, at 55–58 (dissenting opinion of MR. JUSTICE BRENNAN), the reasons for such a limitation have no bearing here. However true it may be that "[i]nnocent citizens should not suffer the shock, fright or embarrassment attendant upon an unannounced police intrusion," *id.*, at 57, and that "the requirement of awareness . . . serves to minimize the hazards of the officers' dangerous calling," *id.*, at 57–58, these considerations are not relevant to the problems presented by judicially authorized electronic surveillance.

Nor do the Federal Rules of Criminal Procedure impose an inflexible requirement of prior notice. Rule 41 (d) does require federal

judicial order could have accommodated "the legitimate needs of law enforcement" [17] by authorizing the carefully limited use of electronic surveillance.

The Government urges that, because its agents relied upon the decisions in *Olmstead* and *Goldman*, and because they did no more here than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause,"

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officers to serve upon the person searched a copy of the warrant and a receipt describing the material obtained, but it does not invariably require that this be done before the search takes place. *Nordelli* v. *United States*, 24 F. 2d 665, 666–667.

Thus the fact that the petitioner in *Osborn* was unaware that his words were being electronically transcribed did not prevent this Court from sustaining his conviction, and did not prevent the Court in *Berger* from reaching the conclusion that the use of the recording device sanctioned in *Osborn* was entirely lawful. 388 U. S. 41, 57.

[17] *Lopez* v. *United States*, 373 U. S. 427, 464 (dissenting opinion of MR. JUSTICE BRENNAN).

Agnello v. *United States*, 269 U. S. 20, 33, for the Constitution requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . ." *Wong Sun* v. *United States*, 371 U. S. 471, 481–482. "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," *United States* v. *Jeffers*, 342 U. S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment [18]—subject only to a few specifically established and well-delineated exceptions.[19]

It is difficult to imagine how any of those exceptions could ever apply to the sort of search and seizure involved in this case. Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an "incident" of that arrest.[20]

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[18] See, *e. g.*, *Jones* v. *United States*, 357 U. S. 493, 497–499; *Rios* v. *United States*, 364 U. S. 253, 261; *Chapman* v. *United States*, 365 U. S. 610, 613–615; *Stoner* v. *California*, 376 U. S. 483, 486–487.

[19] See, *e. g.*, *Carroll* v. *United States*, 267 U. S. 132, 153, 156; *McDonald* v. *United States*, 335 U. S. 451, 454–456; *Brinegar* v. *United States*, 338 U. S. 160, 174–177; *Cooper* v. *California*, 386 U. S. 58; *Warden* v. *Hayden*, 387 U. S. 294, 298–300.

[20] In *Agnello* v. *United States*, 269 U. S. 20, 30, the Court stated:

"The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted."

Whatever one's view of "the long-standing practice of searching for other proofs of guilt within the control of the accused found upon arrest," *United States* v. *Rabinowitz*, 339 U. S. 56, 61; cf. *id.*, at 71–79 (dissenting opinion of Mr. Justice Frankfurter), the concept of an "incidental" search cannot readily be extended to include surreptitious surveillance of an individual either immediately before, or immediately after, his arrest.

Nor could the use of electronic surveillance without prior authorization be justified on grounds of "hot pursuit." [21] And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent.[22]

The Government does not question these basic principles. Rather, it urges the creation of a new exception to cover this case.[23] It argues that surveillance of a telephone booth should be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause. We cannot agree. Omission of such authorization

> "bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck* v. *Ohio*, 379 U. S. 89, 96.

And bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from Fourth Amendment violations "only in the discretion of the police." *Id.*, at 97.

These considerations do not vanish when the search in question is transferred from the setting of a home,

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[21] Although "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others," *Warden* v. *Hayden*, 387 U. S. 294, 298–299, there seems little likelihood that electronic surveillance would be a realistic possibility in a situation so fraught with urgency.

[22] A search to which an individual consents meets Fourth Amendment requirements, *Zap* v. *United States*, 328 U. S. 624, but of course "the usefulness of electronic surveillance depends on lack of notice to the suspect." *Lopez* v. *United States*, 373 U. S. 427, 463 (dissenting opinion of MR. JUSTICE BRENNAN).

[23] Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.

an office, or a hotel room, to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored "the procedure of antecedent justification . . . that is central to the Fourth Amendment," [24] a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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[24] See *Osborn* v. *United States*, 385 U. S. 323, 330.

SUPREME COURT OF THE UNITED STATES

No. 35.—October Term, 1967.

Charles Katz, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[December 18, 1967.]

Mr. Justice Douglas, with whom Mr. Justice Brennan joins, concurring.

While I join the opinion of the Court, I feel compelled to reply to the separate concurring opinion of my Brother White, which I view as a wholly unwarranted green light for the Executive Branch to resort to electronic eavesdropping without a warrant in cases which the Executive Branch itself labels "national security" matters.

Neither the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved they are not detached, disinterested, and neutral as a court or magistrate must be. Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested. Rather it should vigorously investigate and prevent breaches of national security and prosecute those who violate the pertinent federal laws. The President and Attorney General are properly interested parties, cast in the role of adversary, in national security cases. They may even be the intended victims of subversive action. Since spies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers like petitioner, I cannot agree that where spies and saboteurs are involved adequate protection of Fourth Amendment rights is assured when the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate.

There is, so far as I understand constitutional history, no distinction under the Fourth Amendment between types of crimes. Article III, § 3, gives "treason" a very narrow definition and puts restrictions on its proof. But the Fourth Amendment draws no lines between various substantive offenses. The arrests in cases of "hot pursuit," the arrests on visible or other evidence of probable cause cut across the boards and are not peculiar to any kind of crime.

I would respect the present lines of distinction and not improvise because a particular crime seems particularly heinous. When the Framers took that step, as they did with treason, the worst crime of all, they made their purpose manifest.

SUPREME COURT OF THE UNITED STATES

No. 35.—October Term, 1967.

Charles Katz, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[December 18, 1967.]

Mr. Justice Harlan, concurring.

I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, *Weeks* v. *United States*, 232 U. S. 383, and unlike a field, *Hester* v. *United States*, 265 U. S. 57, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment; and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.

As the Court's opinion states, "The Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the

other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable. Cf. *Hester* v. *United States, supra.*

The critical fact in this case is that "[o]ne who occupies it, [a telephone booth] shuts the door behind him, and pays the toll that permits him to place a call, is surely entitled to assume" that his conversation is not being intercepted. *Ante,* p. 5. The point is not that the booth is "accessible to the public" at other times, *ante,* p. 5, but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable. Cf. *Rios* v. *United States,* 364 U. S. 253.

In *Silverman* v. *United States,* 365 U. S. 505, we held that eavesdropping accomplished by means of an electronic device that penetrated the premises occupied by petitioner was a violation of the Fourth Amendment. That case established that interception of conversations reasonably intended to be private could constitute a "search and seizure," and that the examination or taking of physical property was not required. This view of the Fourth Amendment was followed in *Wong Sun* v. *United States,* 371 U. S. 471, at 485, and *Berger* v. *New York,* 388 U. S. 41, at 51. Also compare *Osborn* v. *United States,* 385 U. S. 323, at 327. In *Silverman* we found it unnecessary to re-examine *Goldman* v. *United States,* 316 U. S. 129, which had held that electronic surveillance accomplished without the physical penetration of petitioner's premises by a tangible object did not violate the Fourth Amendment. This case requires us to reconsider *Goldman,* and I agree that it should now be overruled.* Its

*I also think that the course of development evinced by *Silverman, supra, Wong Sun, supra, Berger, supra,* and today's decision must be recognized to overrule *Olmstead* v. *United States,* 277 U. S. 438, which essentially rested on the ground that conversations were not subject to the protection of the Fourth Amendment.

limitation on Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion.

Finally, I do not read the Court's opinion to declare that no interception of a conversation one-half of which occurs in a public telephone booth can be reasonable in the absence of a warrant. As elsewhere under the Fourth Amendment, warrants are the general rule, to which the legitimate needs of law enforcement may demand specific exceptions. It will be time enough to consider any such exceptions when an appropriate occasion presents itself, and I agree with the Court that this is not one.

SUPREME COURT OF THE UNITED STATES

No. 35.—October Term, 1967.

Charles Katz, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[December 18, 1967.]

Mr. Justice White, concurring.

I agree that the official surveillance of petitioner's telephone conversations in a public booth must be subjected to the test of reasonableness under the Fourth Amendment and that on the record now before us the particular surveillance undertaken was unreasonable absent a warrant properly authorizing it. This application of the Fourth Amendment need not interfere with legitimate needs of law enforcement.*

*In previous cases, which are undisturbed by today's decision, the Court has upheld, as reasonable under the Fourth Amendment, admission at trial of evidence obtained (1) by an undercover police agent to whom a defendant speaks without knowledge that he is in the employ of the police, *Hoffa* v. *United States*, 385 U. S. 293 (1966); (2) by a recording device hidden on the person of such an informant, *Lopez* v. *United States*, 373 U. S. 427 (1963); *Osborn* v. *United States*, 385 U. S. 323 (1966); and (3) by a policeman listening to the secret micro-wave transmissions of an agent conversing with the defendant in another location, *On Lee* v. *United States*, 343 U. S. 747 (1952). When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. *Hoffa* v. *United States, supra.* It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another. The present case deals with an entirely different situation, for as the Court emphasizes the peti-

In joining the Court's opinion, I note the Court's acknowledgment that there are circumstances in which it is reasonable to search without a warrant. In this connection, in footnote 23 the Court points out that today's decision does not reach national security cases. Wiretapping to protect the security of the Nation has been authorized by successive Presidents. The present Administration would apparently save national security cases from restrictions against wiretapping. See *Berger* v. *New York*, 388 U. S. 41, 112–118 (1967) (WHITE, J., dissenting). We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.

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tioner "sought to exclude . . . the uninvited ear," and spoke under circumstances in which a reasonable person would assume that uninvited ears were not listening.

SUPREME COURT OF THE UNITED STATES

No. 35.—October Term, 1967.

Charles Katz, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[December 18, 1967.]

Mr. Justice Black, dissenting.

If I could agree with the Court that eavesdropping carried on by electronic means (equivalent to wiretapping) constitutes a "search" or "seizure," I would be happy to join the Court's opinion. For on that premise my Brother Stewart sets out methods in accord with the Fourth Amendment to guide States in the enactment and enforcement of laws passed to regulate wiretapping by government. In this respect today's opinion differs sharply from *Berger* v. *New York*, 388 U. S. 41, decided last Term, which held void on its face a New York statute authorizing wiretapping on warrants issued by magistrates on showings of probable causes. The *Berger* case also set up what appeared to be insuperable obstacles to the valid passage of such wiretapping laws by States. The Court's opinion in this case, however, removes the doubts about state power in this field and abates to a large extent the confusion and near paralyzing effect of the *Berger* holding. Notwithstanding these good efforts of the Court, I am still unable to agree with its interpretation of the Fourth Amendment.

My basic objection is twofold: (1) I do not believe that the words of the Amendment will bear the meaning given them by today's decision, and (2) I do not believe that it is the proper role of this Court to rewrite the Amendment in order "to bring it into harmony with the times" and thus reach a result that many people believe to be desirable.

While I realize that an argument based on the meaning of words lacks the scope, and no doubt the appeal, of broad policy discussions and philosophical discourses on such nebulous subjects as privacy, for me the language of the Amendment is the crucial place to look in construing a written document such as our Constitution. The Fourth Amendment says that

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The first clause protects "persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both. The second clause of the Amendment still further establishes its Framers' purpose to limit its protection to tangible things by providing that no warrants shall issue but those "particularly describing the place to be searched and the person or things to be seized." A conversation overheard by eavesdropping whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized. In addition the language of the second clause indicates that the Amendment refers to something not only tangible so it can be seized but to something already in existence so it can be described. Yet the Court's interpretation would have the Amendment apply to overhearing future conversations which by their very nature are nonexistent until they take place. How can one "describe" a future conversation, and if not, how can a magistrate issue a warrant to eavesdrop one in the future? It is argued that information showing what

is expected to be said is sufficient to limit the boundaries of what later can be admitted into evidence; but does such general information really meet the specific language of the Amendment which says "particularly describing"? Rather than using language in a completely artificial way, I must conclude that the Fourth Amendment simply does not apply to eavesdropping.

Tapping telephone wires, of course, was an unknown possibility at the time the Fourth Amendment was adopted. But eavesdropping (and wiretapping is nothing more than eavesdropping by telephone) was, as even the majority opinion in *Berger*, *supra*, recognized, "an ancient practice which at common law was condemned as a nuisance. 4 Blackstone, Commentaries 168. In those days the eavesdropper listened by naked ear under the eaves of houses or their windows, or beyond their walls seeking out private discourse." 388 U. S., at 45. There can be no doubt that the Framers were aware of this practice, and if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the Fourth Amendment. They certainly would not have left such a task to the ingenuity of language-stretching judges. No one, it seems to me, can read the debates on the Bill of Rights without reaching the conclusion that its Framers and critics well knew the meaning of the words they used, what they would be understood to mean by others, their scope and their limitations. Under these circumstances it strikes me as a charge against their scholarship, their commonsense and their candor to give to the Fourth Amendment's language the eavesdropping meaning the Court imputes to it today.

I do not deny that common sense requires and that this Court often has said that the Bill of Rights' safeguards should be given a liberal construction. This

principle, however, does not justify construing the search and seizure amendment as applying to eavesdropping or the "seizure" of conversations. The Fourth Amendment was aimed directly at the abhorred practice of breaking in, ransacking and searching homes and other buildings and seizing peoples' personal belongings without warrants issued by magistrates. The Amendment deserves, and this Court has given it, a liberal construction in order to protect against warrantless searches of buildings and seizures of tangible personal effects. But until today this Court has refused to say that eavesdropping comes within the ambit of Fourth Amendment restrictions. See, *e. g., Olmstead* v. *United States,* 277 U. S. 438 (1928), and *Goldman* v. *United States,* 316 U. S. 129 (1942).

So far I have attempted to state why I think the words of the Fourth Amendment prevent its application to eavesdropping. It is important now to show that this has been the traditional view of the Amendment's scope since its adoption and that the Court's decision in this case, along with its amorphous holding in *Berger* last Term, marks the first real departure from that view.

The first case to reach this Court which actually involved a clear-cut test of the Fourth Amendment's applicability to eavesdropping through a wiretap was, of course, *Olmstead, supra.* In holding that the interception of private telephone conversations by means of wiretapping was not a violation of the Fourth Amendment, this Court, speaking through Mr. Chief Justice Taft, examined the language of the Amendment and found, just as I do now, that the words could not be stretched to encompass overheard conversations:

> "The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is

that it must specify the place to be searched and the person or *things* to be seized . . . . Justice Bradley in the *Boyd* case [*Boyd* v. *United States*, 116 U. S. 616] and Justice Clark in the *Gouled* case [*Gouled* v. *United States*, 255 U. S. 298] said that the Fifth Amendment and the Fourth Amendment were to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that can not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight." 277 U. S., at 464–465.

Goldman v. *United States*, 316 U. S. 129, is an even clearer example of this Court's traditional refusal to consider eavesdropping as being covered by the Fourth Amendment. There federal agents used a detectaphone, which was placed on the wall of an adjoining room, to listen to the conversation of a defendant carried on in his private office and intended to be confined within the four walls of the room. This Court, referring to *Olmstead*, found no Fourth Amendment violation.

It should be noted that the Court in *Olmstead* based its decision squarely on the fact that wiretapping or eavesdropping does not violate the Fourth Amendment. As shown, *supra*, in the cited quotation from the case, the Court went to great pains to examine the actual language of the Amendment and found that the words used simply could not be stretched to cover eavesdropping. That there was no trespass was not the determinative factor, and indeed the Court in citing *Hester* v. *United States*, 265 U. S. 57, indicated that even where there was a trespass the Fourth Amendment does not automatically apply to evidence obtained by "hearing or sight." The *Olmstead* majority characterized *Hester* as holding "that the testimony of two officers of the law

who trespassed on the defendant's land, concealed themselves one hundred yards away from his house and saw him come out and hand a bottle of whiskey to another, was not inadmissible. While there was a trespass, there was no search of person, house, papers or effects." 277 U. S., at 465. Thus the clear holding of the *Olmstead* and *Goldman* cases, undiluted by any question of trespass, is that eavesdropping, in both its original and modern forms, is not violative of the Fourth Amendment.

While my reading of the *Olmstead* and *Goldman* cases convinces me that they were decided on the basis of the inapplicability of the wording of the Fourth Amendment to eavesdropping, and not on any trespass basis, this is not to say that unauthorized intrusion has not played an important role in search and seizure cases. This Court has adopted an exclusionary rule to bar evidence obtained by means of such intrusions. As I made clear in my dissenting opinion in *Berger* v. *New York*, 388 U. S. 41, 76, I continue to believe that this exclusionary rule formulated in *Weeks* v. *United States*, 232 U. S. 383, rests on the "supervisory power" of this Court over other federal courts and is not rooted in the Fourth Amendment. See *Wolf* v. *Colorado*, concurring opinion, 338 U. S. 39, 40. See also *Mapp* v. *Ohio*, concurring opinion, 367 U. S. 661–666. This rule has caused the Court to refuse to accept evidence where there has been such an intrusion regardless of whether there has been a search or seizure in violation of the Fourth Amendment. As this Court said in *Lopez* v. *United States*, 373 U. S. 427, 438–439, "The Court has in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear [citing *Olmstead* and *Goldman*]. It has been insisted only that the electronic device not be planted by an unlawful

physical invasion of a constitutionally protected area. *Silverman* v. *United States.*"

To support its new interpretation of the Fourth Amendment, which in effect amounts to a rewriting of the language, the Court's opinion concludes that "the underpinnings of *Olmstead* and *Goldman* have been . . . eroded by our subsequent decisions. . . ." But the only cases cited as accomplishing this "eroding" are *Silverman* v. *United States,* 365 U. S. 505, and *Warden* v. *Hayden,* 387 U. S. 294. Neither of these cases "eroded" *Olmstead* or *Goldman. Silverman* is an interesting choice since there the Court expressly refused to re-examine the rationale of *Olmstead* or *Goldman* although such a re-examination was strenuously urged upon the Court by the petitioner's counsel. Also it is significant that in *Silverman,* as the Court described it, "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners," thus calling into play the supervisory exclusionary rule of evidence. As I have pointed out above, where there is an unauthorized intrusion, this Court has rejected admission of evidence obtained regardless of whether there has been an unconstitutional search and seizure. The majority's decision here relies heavily on the statement in the opinion that the Court "need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls." Yet this statement should not becloud the fact that time and again the opinion emphasizes that there has been an unauthorized intrusion: "For a fair reading of the record in this case shows that the eavesdropping was accomplished by means of an *unauthorized physical penetration* into the premises occupied by the petitioners." (P. 509, emphasis added.) "Eavesdropping accomplished by means of such a *physical intrusion* is beyond the pale of even those decisions . . . ."

(Pp. 509, 510, emphasis added.) "Here . . . the officers overheard the petitioners' conversations only by *usurping* part of the petitioners' house or office . . . ." (P. 511, emphasis added.) "[D]ecision here . . . is based upon the reality of an *actual intrusion* . . . ." (P. 512, emphasis added.) "We find no occasion to re-examine *Goldman* here, but we decline to go beyond it, *by even a fraction of an inch.*" (P. 512, emphasis added.) As if this were not enough, Justices Clark and Whittaker concurred with the following statement: "In view of the determination by the majority that the *unauthorized physical penetration* into petitioners' premises constituted sufficient trespass to remove the case from the coverage of earlier decisions, we feel obliged to join in the Court's opinion." (P. 513, emphasis added.) As I made clear in my dissent in *Berger*, the Court in *Silverman* held the evidence should be excluded by virtue of the exclusionary rule and "I would not have agreed with the Court's opinion in *Silverman* . . . had I thought that the result depended on finding a violation of the Fourth Amendment . . . ." 388 U. S., at 79–80. In light of this and the fact that the Court expressly refused to reexamine *Olmstead* and *Goldman*, I cannot read *Silverman* as overturning the interpretation stated very plainly in *Olmstead* and followed in *Goldman* that eavesdropping is not covered by the Fourth Amendment.

The other "eroding" case cited in the Court's opinion is *Warden* v. *Hayden*, 387 U. S. 294. It appears that this case is cited for the proposition that the Fourth Amendment applies to "intangibles," such as conversation, and the following ambiguous statement is quoted from the opinion: "The premise that property interests control the right of the government to search and seize has been discredited." 387 U. S., at 304. But far from being concerned with eavesdropping, *Warden* v. *Hayden* upholds

the seizure of *clothes*, certainly tangibles by any definition. The discussion of property interests was involved only with the common-law rule that the right to seize property depended upon proof of a superior property interest.

Thus, I think that although the Court attempts to convey the impression that for some reason today *Olmstead* and *Goldman* are no longer good law, it must face up to the fact that these cases have never been overruled or even "eroded." It is the Court's opinions in this case and *Berger* which for the first time since 1790, when the Fourth Amendment was adopted, have declared that eavesdropping is subject to Fourth Amendment restrictions and that conversations can be "seized."* I must align myself with all those judges who up to this year have never been able to impute such a meaning to the words of the Amendment.

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*The first paragraph of my Brother HARLAN's concurring opinion is susceptible to the interpretation, although probably not intended, that this Court "has long held" eavesdropping to be a violation of the Fourth Amendment and therefore "presumptively unreasonable in the absence of a search warrant." There is no reference to any long line of cases, but simply a cite to *Silverman*, and several cases following it, to establish this historical proposition. In the first place, as I have indicated in this opinion, I do not read *Silverman* as holding any such thing; and in the second place, *Silverman* was decided in 1961. Thus, whatever it held, it cannot be said it "has [been] long held." I think my Brother HARLAN recognizes this later in his opinion when he admits that the Court must now overrule *Olmstead* and *Goldman*. In having to overrule these cases in order to establish the holding the Court adopts today, it becomes clear that the Court is promulgating new doctrine instead of merely following what it "has long held." This is emphasized by my Brother HARLAN's claim that it is "bad physics" to adhere to *Goldman*. Such an assertion simply illustrates the propensity of some members of the Court to rely on their limited understanding of modern scientific subjects in order to fit the Constitution to the times and give its language a meaning that it will not tolerate.

Since I see no way in which the words of the Fourth Amendment can be construed to apply to eavesdropping, that closes the matter for me. In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. I will not distort the words of the Amendment in order to "keep the Constitution up to date" or "to bring it into harmony with the times." It was never meant for this Court to have such power, which in effect would make us a continuously functioning constitutional convention.

With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment, which started only recently when the Court began referring incessantly to the Fourth Amendment not so much as a law against *unreasonable* searches and seizures as one to protect an individual's privacy. By clever word juggling the Court finds it plausible to argue that language aimed specifically at searches and seizures of things that can be searched and seized may, to protect privacy, be applied to eavesdropped evidence of conversations that can neither be searched nor seized. Few things happen to an individual that do not affect his privacy in one way or another. Thus, by arbitrarily substituting the Court's language, designed to protect privacy, for the Constitution's language, designed to protect against unreasonable searches and seizures, the Court has made the Fourth Amendment its vehicle for holding all laws violative of the Constitution which offend the Court's broadest concept of privacy. As I said in *Griswold* v. *Connecticut*, 381 U. S. 479, "The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy'

of individuals. But there is not." (Dissenting opinion, p. 508.) I made clear in that dissent my fear of the dangers involved when this Court uses the "broad, abstract and ambiguous concept" of "privacy" as a "comprehensive substitute for the Fourth Amendment's guarantee against unreasonable searches and seizures." (See generally dissenting opinion, pp. 507–527.)

The Fourth Amendment protects privacy only to the extent that it prohibits unreasonable searches and seizures of "persons, houses, papers and effects." No general right is created by the Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy. Certainly the Framers, well acquainted as they were with the excesses of governmental power, did not intend to grant this Court such omnipotent lawmaking authority as that. The history of governments proves that it is dangerous to freedom to repose such powers in courts.

For these reasons I respectfully dissent.